

1328

United States 1328

Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of EARL N. McKINNEY, Bankrupt.

WILLIAM COWAN,

Appellant,

vs.

JOHN P. CULL, as Trustee in Bankruptcy in the
Matter of EARL N. McKINNEY, Bankrupt,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court
for the District of Arizona.

FILED

JAN 13 1923

F. D. MONCKTON,
CLERK.

United States
Circuit Court of Appeals
For the Ninth Circuit.

In the Matter of EARL N. McKINNEY, Bankrupt.

WILLIAM COWAN,

Appellant,

vs.

JOHN P. CULL, as Trustee in Bankruptcy in the
Matter of EARL N. McKINNEY, Bankrupt,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court
for the District of Arizona.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Page

Adjudication and Reference.....	11
Affidavit of Service.....	173
Appeal and Supersedeas Bond.....	186
Assignment of Errors.....	178
Bond of Trustee and Order Approving Same..	13
Certificate by Referee to Judge.....	66
Certificate of Clerk U. S. District Court to Transcript of Record.....	196
Certificate of Review.....	168
Citation (Copy).....	194
Citation (Original).....	198
Debtor's Petition.....	1
Designation of Record.....	190

EXHIBITS:

Exhibit "A" Attached to Petition for Review— Record of Proceedings in Cause No. 2818..	94
Exhibit "B" Attached to Petition for Review— Record of Proceedings in Cause No. 2961..	137
Minutes of Court—October 17, 1921—Order Fixing Date of Hearing.....	171
Minutes of Court—November 1, 1921—Order Overruling Motion to Dismiss.....	174

Index.	Page
Minutes of Court—September 5, 1922—Order Affirming Referee's Findings of Fact and Conclusions of Law.....	175
Motion to Strike Petition for Review and Dis- missal of Same.....	171
Names and Addresses of Attorneys of Record..	1
Notice for Hearing Petition for Review	170
Notice to Trustee of His Appointment.....	12
Order Affirming Referee's Findings of Fact and Conclusions of Law	175
Order Allowing Supersedeas	185
Order Approving Bond of Trustee.....	14
Order Citing Wm. Cowan to Appear Before Trustee	50
Order Enlarging Time to and Including Decem- ber 15, 1922, to File Record and Docket Cause	192
Order Enlarging Time to and Including Decem- ber 26, 1922, to File Record and Docket Cause	193
Order Fixing Date of Hearing	171
Order for Return of Files to Referee With In- structions	70
Order for Trustee to Bring Suit	40
Order Overruling Motion to Dismiss	174
Order Overruling Petition of Trustee	65
Petition for Appeal to Circuit Court of Ap- peals and Order Allowing Same	176
Petition for Review	88
Record of Proceedings Had Before Referee ..	71
Referee's Findings of Fact and Conclusions...	51

Index.	Page
Referee's Findings of Fact and Conclusions of Law	82
Report of Trustee John P. Cull, Douglas, Arizona	41
Special Appearance and Objections Filed by William Cowan to Referee's Show Cause Order, Dated 16th day of February, 1920..	62
Special Report of Trustee	36
Statement of Evidence of Bankrupt	26
Statement of Testimony of William Cowan Taken upon His Examination Before the Referee Herein on December 22, 1919	67
Stipulation in re Appeal Bond	184
Supplemental Report of Trustee John P. Cull..	24
TESTIMONY ON BEHALF OF BANK- RUPT:	
McKINNEY, EARL NICHOLS	26
Trustee's First Report	15

Names and Addresses of Attorneys of Record.

DAVID BENSHIMOL, Esq., Douglas, Arizona,
Attorney for William Cowan.

C. V. MANATT, Esq., Douglas, Arizona,
Attorney for John P. Cull, Trustee.

Debtor's Petition.

(Form No. 1.)

To the Honorable Judge of the District Court of
the United States for the District of Arizona.

The petition of Earl N. McKinney of Douglas, in
the County of Cochise, in the State and District of
Arizona by occupation Dairyman, respectfully rep-
resents:

That he has been a *bona fide* resident at a point
about three miles north of Douglas, Cochise County,
Arizona, for the greater portion of six months next
immediately preceding the filing of this petition at
Tucson, Pima County, Arizona, within said judicial
district; that he owes debts which he is unable to
pay in full; that he is willing to surrender all his
property for the benefit of his creditors except such
as is exempt by law, and desires to obtain the bene-
fit of the acts of Congress relating to bankruptcy.

That the schedule hereto annexed, marked A, and
verified by your petitioner's oath, contains a full
and true statement of all his debts, and (so far as
it is possible to ascertain) the names and places of

residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts.

That the schedule hereto annexed, marked B, and verified by your petitioner's oath, contains an accurate inventory of all his property, both real and personal, and such further statements concerning said property as are required by the provisions of said acts.

WHEREFORE, your petitioner prays that he may be adjudged by the Court to be a bankrupt within the purview of said acts.

EARL N. McKINNEY,
Petitioner.

D. A. RICHARDSON,
Attorney for Petitioner.

United States of America,
County of Pima, District of Arizona,—ss.

I, Earl N. McKinney, the petitioning debtor mentioned and described [1*] in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief.

EARL N. McKINNEY,
Petitioner.

Subscribed and sworn to before me this 9th day of April, 1918.

My commission expires May 12th, 1920.

[Seal]

A. T. SMITH,
Notary Public.

*Page-number appearing at foot of page of original certified Transcript of Record.

SCHEDULE A (2).
CREDITORS HOLDING SECURITIES.

Amount.

Judgment in Superior Court of Cochise County, Arizona, which carries foreclosure of mortgage liens on all property listed in Schedules B (1) and B (2) in favor of Wm. Cowan of Tombstone, Arizona, this indebtedness was represented by several mortgages given for borrowed money ranging in dates from Jan. 21st, 1914, to May 10th, 1917, which moneys were borrowed by Earl N. McKinney individually, and contracted at Douglas, Arizona.	\$20401.68
Note of Six Hundred Dollars payable to Jacob Scheerer, of Douglas, Arizona, for amount due said Scheerer for his having paid a debt on which he had become a surety dated Dec. 22d, 1916, and due seven months after date drawing 10% interest, and secured by a second chattel mortgage on all of cattle mentioned in Schedule B (2)	755.00

\$21156.68

EARL N. McKINNEY,
Petitioner. [2]

SCHEDULE B.
STATEMENT OF ALL PROPERTY OF BANK-
RUPT.

SCHEDULE B (1).

REAL ESTATE.

Location and description of all real estate owned by debtor, or held by him. Incumbrances thereon, if any, and dates thereof. Statement of particulars relating thereto.

	Amount.
N.W. $\frac{1}{4}$ Sec. 31, Township 23, range 28, 159 acres	\$ 5,000.00
S. $\frac{1}{2}$ NW. $\frac{1}{4}$ and W. $\frac{1}{2}$ NE. Sec. 29, Township 23, range 28, 160 acres ...	1,600.00
Lots 1 & 2 and S. $\frac{1}{2}$ N.E. $\frac{1}{4}$ Sec. 1, Town- ship 24, Range 27, containing 158 acres	1,600.00
S.W. $\frac{1}{4}$ Sec. 29, Township 23, Range 28, containing 160 acres	1,600.00
W. $\frac{1}{2}$ S.E. $\frac{1}{4}$ and E. $\frac{1}{2}$ S.W. $\frac{1}{4}$ Sec. 30, Township 23, Range 28, containing 160 acres	1,000.00
All of the above lands situated in Cochise County, Arizona, and are subject to a judgment lien in favor of Wm. Cowan of Tombstone, Arizona, for the sum of \$20,341.68.	

In addition to the above I have a lease from the state of Arizona on Sec. 36, Township 22 S. Range 26 E. G. & S. R. meridian. The improvements thereon being covered by the Judgment mentioned.

Total	\$10,800.00
EARL N. McKINNEY,	
Petitioner. [3]	

SCHEDULE B. (2).

Personal Property.

Dollars/Cents

A. Cash on hand

None

B. Bills of exchange, promissory notes, or security of any description (each to be set out separately).

none

C. Stock in trade in business of at of the value of

none

D. Household goods and furniture, household stores, wearing apparel and ornaments of the person, viz.:

none

Household goods \$150.00

Personal apparel 75.00

E. Books, prints and pictures, viz.:

none

F. Horses, cows, sheep and other animals (with number of each), viz.:

100 Dairy cows worth \$125.00 each....	\$12500.00
100 head <i>young</i> dairy cattle	5000.00
12 head horses and mules	800.00

Now in the possession of Wm. Cowan near Douglas, Arizona.

G. Carriages and other vehicles, viz.:

Three wogans	\$175.00
one truck	200.00
one buggy	25.00

Now in possession of Wm. Cowan near Douglas, Arizona.

H. Farming stock and implements of husbandry, viz.:

Two sets of harness.....	45.00
Plow, mowing machine and rake	175.00

Now in possession of Wm. Cowan near Douglas, Arizona.

I. Shipping and shares in vessels, viz.:

none

<p>K. Machinery, fixtures, apparatus and tools used in business, with the place where each is situated, viz.:</p> <p>L. Patent, copyrights and trademarks, viz.:</p> <p>M. Goods or personal property of any other description, with the place where each is situated, viz.:</p>	<p>Dairy machinery, bottles, milk-cans and tools used in operating dairy.....</p> <p>Now in possession of Wm. Cowan near Douglas, Arizona.</p>	<p>500.00</p>
	<p>none</p>	
	<p>none</p>	<p>\$19,645.00</p>
	<p>EARL N. MCKINNEY, Petitioner. [4]</p>	

SUMMARY OF DEBTS AND ASSETS.

Dollars/Cents

Schedule A	1.	(1) Taxes and debts due the United States	
	1.	(2) Taxes due States, Counties, Districts and Municipalities.	
	1.	(3) Wages	
	1.	(4) Other debts preferred by law	\$250.00
Schedule A	2.	Secured claims	\$21,156.68
Schedule A	3.	Unsecured claims	7,222.87
Schedule A	4.	Notes and bills which ought to be paid by other parties thereto.....	
Schedule A	5.	Accommodation paper	
Schedule A, Total.....			\$28,629.55
Schedule B	1.	Real Estate	\$10,800.00
Schedule B	2.	a Cash on hand	00.00
	2.	b Bills, promissory notes and securities	00.00
	2.	c Stock in trade.....	00.00
	2.	d Household goods, etc.....	225.00
	2.	e Books, prints and pictures.....	00.00
	2.	f Horses cows and other animals..	\$18,300.00
	2.	g Carriages and other vehicles...	400.00
	2.	h Farming stock and other imple-ments	220.00
	2.	i Shipping and shares in vessels..	00.00
	2.	k Machinery, tools, etc.....	500.00
	2.	l Patents copyrights and trade-marks	00.00
	2.	m Other personal property.....	00.00

Schedule B.	3.	a	Debts due on open accounts....	00.00
	3.	b	Stocks, negotiable bonds, etc...	00.00
	3.	c	Policies of insurance	00.00
	3.	d	Unliquidated claims	00.00
	3.	e	Deposits of money in banks and elsewhere.....	00.00
Schedule B.	4.		Property in reversion, remainder, trust, etc.....	00.00
Schedule B.	5.		Property claimed to be exempt...	2590.00
Schedule B.	6.		Books, deeds and papers.....	00.00
				<hr/>
Schedule B,	Total			\$33,035.00

EARL N. McKINNEY,
Petitioner.

[Endorsed on back]: Filed April 9, 1918. Mose Drachman,
Clerk. By Effie D. Botts, Deputy. [5]

In the United States District Court for the District of Arizona, at Tucson.

IN BANKRUPTCY—No. B-31—TUCSON.

In the Matter of EARL N. McKINNEY, Bankrupt.

Adjudication and Reference.

At Tucson, in said District, on the 9th day of April, 1918, before the Honorable William H. Sawtelle, Judge of the said Court in Bankruptcy, the petition of Earl N. McKinney, that he be adjudged bankrupt, within the true intent and meaning of the acts of Congress relating to bankruptcy, having been heard and duly considered, the said Earl N. McKinney is hereby declared and adjudged bankrupt accordingly.

And it is further ordered that the said matter be referred to F. H. Bernard of Tucson, Pima County, Arizona, one of the referees in bankruptcy of this Court, to take all such further proceedings therein as are required by said Acts of Congress, and all such acts therein as the Court might take or perform, except such as by law or the general orders of the Supreme Court are required to be performed by the Judge; and that the said bankrupt shall attend before said referee on the 25th day of April, 1918, at ten o'clock A. M., and thenceforth shall submit to such orders as may be made by said referee or by the Court relating to his said bankruptcy.

WITNESS, the Honorable WILLIAM H. SAWTELLE, Judge of the said Court, and the seal thereof, at the City of Pima, in said District, on the 11th day of April, 1918.

[Seal]

MOSE DRACHMAN,

Clerk.

By Effie D. Botts,

Deputy Clerk.

[Endorsed on back:] Filed this 12th day of April, 1918, at 9 o'clock A. M. F. H. Bernard, Referee in Bankruptcy. [6]

In the District Court of the United States for the District of Arizona.

IN BANKRUPTCY—No. B-31 (TUCSON).

In the Matter of EARL N. McKINNEY, Bankrupt.

Notice to Trustee of His Appointment.

To J. P. Cull of Douglas, in the County of Cochise, and District Aforesaid.

I hereby notify you that you were duly appointed trustee of the estate of the above-named bankrupt at the first meeting of the creditors, on the 25th day of April, A. D. 1918, and I have approved such appointment. The penal sum of your bond as such Trustee has been fixed at \$500.00. You are required to notify me forthwith of your acceptance or rejection of the trust.

Dated at Tucson, Arizona, this 25th day of April,
A. D. 1918.

F. H. BERNARD,
Referee in Bankruptcy.

[Endorsed]: Filed Dec. 12, 1922. C. R. Mc-
Fall, Clerk. United States District Court for the
District of Arizona. ,[7]

Bond of Trustee and Order Approving Same.

KNOW ALL MEN BY THESE PRESENTS:
That we, John P. Cull, of Douglas, Ariz., as prin-
cipal, and J. T. Hood of Douglas, Ariz., and W. J.
Reay of Douglas, Ariz., as sureties, are held and
firmly bound unto the United States of America
in the sum of Five Hundred (\$500.00) Dollars, in
lawful money of the United States, to be paid to the
said United States, for which payment, well and
truly to be made, we bind ourselves and our heirs,
executors, and administrators, jointly and sever-
ally, by these presents.

Signed and sealed this 29th day of April, A. D.,
1918.

The condition of this obligation is such, that
whereas the above-named John P. Cull was, on the
25th day of April, 1918, appointed trustee in the
case pending in bankruptcy in said court, wherein
Earl N. McKinney is the bankrupt, and he, the
said John P. Cull, has accepted said trust with
all the duties and obligations pertaining thereunto.

Now, therefore, if the said John P. Cull, trustee

as aforesaid, shall obey such orders as said Court may make in relation to said trust, and shall faithfully and truly account for all the moneys, assets, and effects of the estate of said bankrupt which shall come into his hands and possession, and shall in all respects faithfully perform all his official duties as said trustee, then this obligation to be void; otherwise, to remain in full force and virtue.

JOHN P. CULL. (Seal)

J. T. HOOD. (Seal)

W. J. REAY. (Seal)

Signed and sealed in the presence of

G. C. OSBURN, Douglas, Ariz.

B. M. ASHLEY, Douglas, Ariz. [8]

In the District Court of the United States for the
District of Arizona.

IN BANKRUPTCY—No. B-31 (TUCSON).

In the Matter of EARL N. McKINNEY, Bankrupt.

ORDER.

At a court of bankruptcy held in and for the District of Arizona, at Tucson, Arizona, on the 30th day of April, 1918.

Before F. H. Bernard, Referee in Bankruptcy, in the District Court of the United States for the District of Arizona.

It appearing to the Court that John P. Cull, of Douglas, in said District, has been duly appointed trustee of the estate of the above-named bankrupt

and has given bond with sureties for the faithful performance of his official duties, in the amount fixed by order of the Court, to wit, in the sum of \$500.00—

IT IS ORDERED that the said bond be, and the same is, hereby approved.

F. H. BERNARD,
Referee in Bankruptcy.

[Endorsed on back:] Bond of Trustee and Order Approving Same. Filed April 30, 1918. Mose Drachman, Clerk. By Effie D. Botts, Deputy.
[9]

In the District Court of the United States for the
District of Arizona.

IN BANKRUPTCY—No. B-32.

In the Matter of EARL N. McKINNEY, Bankrupt.

Trustee's First Report.

To F. H. Bernard, Esq., Referee in Bankruptcy:

I, John P. Cull, the Trustee in this proceeding, do hereby report as follows:

That, on the 26th day of April, 1918, I was appointed Trustee herein, immediately qualified by filing the required bond and have since acted as such.

That on entering upon my duties I investigated as to what was done with the property of the bankrupt, and after some considerable trouble and much time, the bankrupt having immediately left

the State and located as I am informed in the State of California, and having no sources of information but as I could search it out I have had much trouble in arriving at any definite conclusion on any proposition, as all the property was turned over to one William Cowan one of the principal creditors, or at least I found the said William Cowan in possession of about all the property left by said bankrupt, except as herein set out.

That the only property that is now available to this trustee and can be handles and sold for the benefit of the creditors is the following described real estate to wit:

(The following paragraph enclosed in parentheses, is marked on original report: "Not available. See latter part of Report."—Clerk's Note.)

The North one-half ($\frac{1}{2}$) of the Northwest quarter ($\frac{1}{4}$) also known as Lot No. One (1) and the Northeast quarter of the Northwest quarter all of Section No. Thirty-one in Township 33 South of Range 28 East of Gila & Salt River Base and Meridian, in the County of Cochise, State of Arizona, the tract containing about 80 acres.

Also a lease on *on* school lands from the State of Arizona to [10] Sec. 36 Tp. 22 South of Range 26 East of Gila & Salt River Base and meridian in said County of Cochise, State of Arizona.

(2) That the trustee has never been able to get this lease contract but hopes to get same in his possession sooner or later however as shown by the petition filed herein the bankrupt claims that all

improvements on this Section are in the possession of the said William Cowan under his said judgment.

That this part of the property should be ordered sold and disposed of as soon as it is possible; the lease I believe could be sold at private sale to better advantage than at public auction. These two properties should be appraised and ordered sold as no benefit can be had by holding longer.

That as soon as I receive a certified copy of the order approving my bond and adjudication I will file same in the office of the County Recorder of this county where this land is located.

That the bankrupt asks and claims that he is entitled to the following property as exemptions:

The South half of NW. $\frac{1}{4}$ and West $\frac{1}{4}$ of
the NE. $\frac{1}{4}$ all of Sec. 29 Tp. 23
South of Range 28 East of Gila and
Salt River Base and Meridian in
Cochise County, State of Arizona,
valued at \$1600.00

As a homestead:

Household goods situated on ranch near Douglas, Arizona, valued at	150.00
Five milch cows described in the petition and valued at	625.00
Two head of horses valued at	150.00
Set of harness valued at	25.00
One wagon valued at	40.00

Total \$2590.00

I find on investigation that at about the time of the filing and adjudication of the bankrupt's peti-

tion and at the time he turned over the property to said William Cowan the bankrupt left the State of Arizona and took up his residence in the State of California. and is now a nonresident of the the State of Arizona. [11]

This being a fact I do not believe that the bankrupt is entitled to the provisions of law granting him exemptions and that such provisions granting exemptions apply only to *bona fide* residents of the State of Arizona and that being true a citation should issue to him to show cause why this property should not be taken over by the trustees and administered on for the benefit of the creditors.

(3) Section 3288 of the 1913 Statutes defines those who are entitled to Homesteads exemptions, 'as Every person who is the head of a family and whose family reside within this State, * * *

Sec. 3302 provides as to personal exemptions and being a part of the same Chapter as to homesteads the provisions as to who may claim exemptions of personal effects must be the same as laid down in Sec. 3288.

I am advised that the bankrupt having taken up his residence in the State of California before his exemptions have been adjudicated will defeat his rights to exemptions.

As is known by you and has been reported herein all the rest of the property as scheduled by bankrupt was taken over by one William Cowan the largest creditor, and the excuse and cause of this taking is given as under a Judgement rendered in the Superior Court of Cochise County Arizona.

I have been unable to ascertain to a certainty the exact date of this change of possession from the Bankrupt to said Cowan but it must have been about the time of the proceedings here instituted, and I have had examined the Court Proceedings leading up to this taking and find that the Complaint filed sets up seven causes for action, and was filed on the 2d day of January, 1918.

The First Cause alleges on a promissory note of date Jan. 8th, 1915, for the sum of \$3,500.00 and interest Int. paid to Jan. 8th, 1916.

Note secured by Real Estate Mtg. N. $\frac{1}{2}$ of NW. $\frac{1}{4}$ or Lot 1 and NE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ or Lot 2 and S. $\frac{1}{2}$ of NW. $\frac{1}{4}$ and SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$. All in Sec. 31 Tp. 23 S. of Range 28.

Additional security on Chattels 16 head of horses, 1 mule and all cattle branded E. R. L. in Sulphur Springs Valley.

2d Cause for Action on Note of \$2,000.00 dated Jan. 5th, 1916—10% interest.

Secured by real estate Mtg. on SE. $\frac{1}{4}$ Sec. 4 E. $\frac{1}{2}$ of SW. $\frac{1}{4}$ and W. $\frac{1}{2}$ of SE. $\frac{1}{4}$ Sec. 30, all in above Tp. and Range. [12]

3d. Cause of action on note of \$2500.00 dated May 22d. 1916, 10% interest Secured on Real Estate S. $\frac{1}{2}$ of NW. $\frac{1}{4}$ and *and* W. $\frac{1}{2}$ of NE. $\frac{1}{4}$ and SW. $\frac{1}{4}$, all in Sec. 29, Same Tp. and Range.

4th. Cause of action on note for \$1660.00 of date Oct. 22d, 1914, secured on chattels 35 cows, 26 calves. Filed Nov. 7th, 1917.

5th. Cause of action on note of \$4600.00 of date Jan. 15th, 1914. Secured by Chattel Mtg. on 200 head or more cattle (4) all the cattle he owns and increase branded E. R. L.

6th. Cause of action on note of \$2000.00 dated Feby. 18th, 1914, secured by chattel Mtg. on 30 cows, 2 Delivery wagons, 14 head of horses, 2 Feed Wagons, 2 Cream separators.

7th. Cause of action on chattel mtg. *no* note mtg. dated May 8th, 1917, and given for \$300.00 on Ford Automobile.

On the 4th day of Jan., 1918, Earl N. McKinney, bankrupt, made his personal appearance and filed his answer confessing that he executed the above notes and mortgages and offered to confess judgement for the sums of \$16,260.00 principal, \$3641.68 Interest and \$1974.59 Attys. Fee.

The answer was signed by Earl McKinney himself but from all appearances the same was prepared by David Benshemol, the plaintiff's attorney.

There appears a letter to the Judge from McKinney of date Jan. 4th, 1918, stating in substance that Mr. Benshemol had him sign a confession of judgement in favor of Wm. Cowan in the suit brought Jan. 2d. and states that he did not understand the nature of the judgement until I see Mr. Cowan and not enter the judgement until he could see Mr. Cowan.

The summons in this suit was issued but not served or handed to the sheriff for service.

On the 8th day of Jan., 1918, there was filed the following agreement for judgement:

“It is hereby stipulated and agreed by and between the plaintiff and defendant that judgement may be entered for the plaintiff for the sum of \$16,260.00 principal and \$3641.68 Int. Interest computed at the rate of 10% per annum to Jan. 3d, 1918, and an attorney fee payable to David Ben-shemol, Esq., for \$500.00 and costs and that execution may be issued hereon as prayed for in the complaint.

Signed—WILLIAM COWAN.
EARL McKINNEY.

The Court has made the following minute entry:

“Jan. 8th, 1918.

(Title.)

Upon consideration of the confession of judgement filed herein by the defendant, it is by the Court ordered that upon presentation by the plaintiff of a formal written judgement in the action and its approval and signing by the Court Judgement will be rendered in favor of plaintiff and against defendant. [13]

That no written judgement was ever presented to the Court for approval and signing nor has in said case there ever been entered any judgement.

(5) That the said William Cowan has taken over all the assets and property of the bankrupt except the property claimed as exempt, and the lease from the State of Arizona to McKinney of Sec. 36 described above.

I find since writing out the first part of this report that the 80 acres above described as being subject to administration by this Trustee is included in the

first mortgage and in the first cause of action of the Complaint and is now in the possession of *the* William Cowan, and cannot be used at this time.

That there has been filed in Court none of the original mortgages on notes for cancellation as required by law in said case of Cowan vs. McKinney.

That the acts of Cowan and McKinney shows a plain case of unlawful conversion of the property of the Bankrupt by said William Cowan and I am advised that an action against Cowan for the full value of this property is about the only way we can get results or an action for the difference between the amount of Cowan's Mtgs. and the Value of the property, and just which proceeding would get the best results is hard for me at this time to say, but it would seem to me that an action for the value of the property would be best as Cowan has at the time nor since any order of Court or judgement authorizing him to take over this property.

In that case all said property should be appraised by appraisers and as Mr. Packard one of the appraisers named *have* very close relations with Mr. Cowan I believe it would be for the best interests of the creditors that Pearl Adams be appointed in his place to make this appraisement.

I ask you to make the necessary orders on this report that will best preserve the interests of this estate, and especially take some action on the exemptions as I do not believe that the bankrupt is entitled to same and that such property should be turned over to me for administration, and order what action

seems best as to the conversion of the property by said William Cowan.

That some of the property should be sold so that I will be able to get funds to carry on the administration of this estate as I have not been able to [14] get any funds and what work has been done has been (6) done with the understanding that possibly some funds may be realized sooner or later.

I have no funds in hand so far.

Dated this 31st day of July, A. D. 1918.

JOHN P. CULL,
Trustee.

State of Arizona,
County of Cochise,
City of Douglas,—ss.

I, John P. Cull, the Trustee herein, do hereby make solemn oath that the statements and facts contained in the above report are true according to the best of my knowledge, information and belief.

JOHN P. CULL.

Subscribed and sworn to before me this 31st day of July, A. D. 1918.

[Seal]

H. D. PALMER,
Notary Public.

My commission expires June 1, 1921.

[Endorsed on back]: Filed this 3d day of August, 1918, at 9 o'clock A. M. F. H. Bernard, Referee in Bankruptcy. [15]

In the District Court of the United States, in
the District of Arizona.

BANKRUPTCY—No. B-31—TUCSON.

F. H. BERNARD, Referee.

In the Matter of the Estate of EARL McKINNEY,
Bankrupt.

Supplemental Report of Trustee John P. Cull.

Since filing Report on investigation I find that at about the time that William Cowan took over the property of said above *bakrupt* Novr. 2d, 1917, he did so not with the free will of the Bankrupt but forced Bankrupt to do so, and at the time and before this occurred he desired to go through bankruptcy but was advised by Cowan and Counsel Benshemol that he must not do so, and they Cowan and his counsel proceeded to not only get hold of all the property both real and personal, possessed by McKinney, that Cowan claimed a lien on by virtue of his mortgages but got and took over the business which was run for the benefit of Cowan from Novr. 2d, 1917, up to about the time McKinney filed his petition in Bankruptcy herein.

There has been no accounting for the money received while having possession of and running the business by Cowan from the 2d day of Novr. 1917 to April 1918.

That said Benshemol for Cowan took possession of the following property that was not covered by

mortgage and converted it to his own use, or the use of Cowan:

The Dairy Lunch, a restaurant sold to LePine Novr. 2d, 1917 by Cowan and Benshemol for the sum of \$619.52.

Several head of hogs disposed of by them for a sum unknown by us.

The leases and improvements on school section 36 Cochise County, State of Arizona, valued at \$1500.00 improvement.

Safety check apparatus valued at \$35.00. [16]

What has become of the property claimed as exempt we believe (2) that it will be found that Cowan has absorbed it.

I believe the only way to get at the facts in these transactions is for you to issue a citation to William Cowan and David Benshemol his attorney to appear before you for an examination in Douglas, Arizona at some date to be fixed by you, at which we may attend and examine under oath these parties as to the disposition of the Bankrupt's property.

We have reduced none of the property to possession so can see no value in any appraisement for the estate at this time.

JOHN P. CULL.

Subscribed and sworn to on information & belief before me this 2d day of October, 1918.

[Seal]

J. W. CALVERT,

Noatary Public.

My commission expires May 5th, 1920.

[Endorsed on back:] Filed this 4th day of October, 1918, at 9 o'clock A. M. F. H. Bernard, Referee in Bankruptcy. [17]

In the District Court of the United States for the
District of Arizona.

BANKRUPTCY — No. B-31—TUCSON.

In the Matter of EARL McKINNEY, Bankrupt.

Statement of Evidence of Bankrupt.

At a meeting in Bankruptcy held in the City of Douglas, County of Cochise, and District aforesaid, on this 21st day of October, 1918, before F. H. Bernard, Referee in Bankruptcy.

This being the return date upon the order issued heretofore by the Referee, requiring the bankrupt to appear and be examined and Earl N. McKinney, the bankrupt herein, being present, with his attorney, and the Trustee herein, John P. Cull, and his attorney C. V. Manatt, being also present, the bankrupt was duly sworn and testified in substance as follows:

Testimony of Earl Nichols McKinney, Bankrupt.

My name is Earl Nichols McKinney, and I now reside in the town of Gilbert, Arizona. I have lived near Douglas previously since February, 1905, where I was in the dairy business up to about the first day of November, 1917. On that latter date William Cowan took over all my property both real and personal stating at the time that he would run

the business until he got his money out of it, and that he would return the property when he got paid off. In this arrangement, Cowan claimed that I owed him in the neighborhood of \$19,000, which indebtedness was covered by a mortgage over all of my property, lots, cattle, and everything else.

As to whether or not any part of this amount has been paid I will state that a portion has been paid but I do not remember how much. I do not know for sure and therefore cannot say. Cowan told me he has credited all amounts paid [18] by me on the notes and also W. S. Dixon has done likewise. I do not know how many of my notes Dixon held or holds or how many are in Cowan's possession but there are no more than there should be. With regard to the foreclosure suit, filed in the Superior Court of Cochise County, in January, 1918, I was never served with any papers. David Benshimol, Cowan's attorney, gave me an acknowledgment of the debt and I signed it. It was a confession of judgment. I objected to a charge of \$1900.00 attorneys' fees in this suit and upon the amount being reduced to \$500.00 I signed the confession.

The following questions were then asked by Mr. Manatt on behalf of the Trustee:

"Now Mr. McKinney in the foreclosure suit filed against you in Cochise County the pleadings show the following causes of action:

The first cause of action, a note for \$3500.00 dated January 8th, 1915, covered by a real estate mortgage.

Mr. McKINNEY.—The start of all was the \$4600.00 mortgage.

Mr. MANATT.—On this \$3500.00 note there appears to be two endorsements of payments of interest. October 23d, 1915, \$87.50 interest paid to April 8th, 1915, and January 3d, 1916, \$262.50 interest paid to January 8th, 1916.

The second cause of action is on a note for \$2000.00 dated January 5th, 1916, no endorsements whatever.

The third cause of action is upon a note for \$2500.00, dated May 22d, 1916, no endorsements.

Mr. McKINNEY.—This money was paid by Cowan and he got a mortgage over my school section.

The fourth cause of action is on a note for \$1660.00, dated October 22d, 1914, secured by a chattel mortgage. Endorsement of interest payment dated January 22d, 1915, no amount given. [19]

The fifth cause of action, note for \$4600.00, dated January 21st, 1914, endorsement, interest paid November 3d, 1915. No amount given.

This note is secured by a mortgage over two hundred head of cattle.

Mr. McKINNEY.—This is the first mortgage I ever gave.

The sixth cause of action is on a note for \$2000.00, endorsements interest paid to September 18th, 1914. No amount given.

The seventh cause of action, note for \$300, dated

May 8th, 1917, secured by chattel mortgage on Ford automobile.

Mr. McKINNEY.—Cowan never paid me any money on this note. It was not supposed to be in any of my indebtedness.

Mr. MANATT.—The notes, as shown in the complaint, show a payment by you Mr. McKinney of \$350.00 and no amounts are given for the other interest payments.

Mr. McKINNEY.—I do not know what the notes show as I never saw them but I paid more than \$350.00.

Mr. MANATT.—Did Mr. Cowan take possession under his various mortgages?

Mr. McKINNEY.—Yes, Cowan took possession of everything.”

Further testifying the bankrupt stated as follows:

Cowan and Benshimol brought Jim Lowans out to my ranch, and they spent about a week counting cattle, and Cowan said he would have to have his money then for some reason.

I turned in all money from the business to Benshimol and he was to pay all bills. No account was ever rendered to me but I understood the ranch account was carried in the name of William Cowan, mortgagee, by David Benshimol, attorney, [20] and the moneys collected deposited in the First National Bank of Douglas, Arizona. The average monthly receipts of the business at the time I turned it over to Cowan was from twelve to fifteen hundred dollars a month. The expenses ran about the same.

When I turned over all my property to Cowan

in November, 1917, the cattle were not counted, but at that time I had between two hundred and two hundred and fifty head of cattle. About one hundred milk cows, and about one hundred and fifty range cattle.

I never gave a bill of sale for anything. Cowan said the property was all his and I supposed it was. He had a mortgage over everything. He offered to cancel everything but never did. I never gave him a bill of sale or deed for the property.

As to the Dairy Lunch, Cowan had a mortgage on the fixtures at the time the \$300.00 mortgage on the automobile was given. The mortgage on the fixtures was never recorded as far as I know.

About three years ago I moved about one hundred and fifty head of cattle to Phoenix and shipped back to Douglas eighty-four head, and Cowan got the money for the balance. This was in October, November and December, three years ago. I sent him three checks, one for eleven or twelve hundred dollars, two for five hundred each, amounting in all to approximately \$2200.00, and Cowan said he gave me credit for these amounts on my notes. These amounts paid by me should have been endorsed on some of the notes.

When Cowan took over my property he said that when he was paid out in full he would turn it back to me. Mr. Benshimol was to be the cashier and draw \$25.00 a month from the business. This was a verbal arrangement. I left the ranch on April 2d, 1918, and between November, 1917, and April, 1918, I

worked at the ranch under the arrangement with Cowan. [21]

I do not know whether the payment of \$350.00 endorsed on the notes is taken out of the \$2200.00 I sent Cowan but I believe I paid more than \$2200.00. Cowan sold the Dairy Lunch to Lapine for \$500.00, at least that is the consideration I understood. I do not know that Lapine paid \$619.00 for the Dairy Lunch. Benshimol wanted it sold and both he and Cowan told me it was sold for \$500.00.

As to the property on Twentieth Street, I was buying that on contract with Dixon. I was to pay \$10.00 a month and I made two payments and with Cowan's permission moved a house from the ranch on to this property at an expense of about \$150.00. Cowan paid the balance on the contract with Dixon amounting to \$250.00 and I believe he got a deed for the property.

As to my financial affairs, I will state that I wanted to go into bankruptcy before I turned over my property to Cowan but neither Cowan or Benshimol would consent to it and Cowan left it to Benshimol to take care of my creditors. They began to get rid of me the last of March, 1918, when Kirkland was sent out to the ranch.

I estimate the value of my property at the time it was turned over to Cowan to between thirty and thirty-five thousand dollars. Cowan did not think it was worth \$19,000.00 but I never agreed with him. The value of the 20th Street property was as follows: The lot \$275.00, and house and improvements \$150.00.

As to the chattel mortgage on the cattle, with Cowan's consent there were a number of changes made and I bought and sold many cattle. I cannot say now how many of the cattle included in the original mortgage are now on the property or were at the time I turned over everything to Cowan. There were quite a few changes but I think there are still a few old cows left. [22] I cannot, however, make any estimate as new stuff was bought continually, cattle sold and the money turned over to Cowan.

With regard to the business I will state that there were numerous improvements on the land comprising the home ranch, plant and separator together worth about \$15,00.00, corrals, barns, tanks, etc. I never had any accounting with Cowan. I paid more to Cowan than the \$350.00 and interest payments noted on the several notes. I do not think Cowan would take advantage of me but believe Benshimol would. I stayed on the ranch from the first of November, 1917, to the first of April, 1918, and was paid under the following arrangement with Cowan and Benshimol. I owed a number of bills in Douglas and I let these creditors have milk and the amount of milk supplied such creditors was credited against my account. Benshimol knew of this agreement and the amount so credited.

I do not know why the foreclosure suit was brought in January, 1918, after I had turned over the property to Cowan in November, 1917. Benshimol however, said that the suit could be started

and left pending until such time as the creditors were paid in full. Benshimol told me he would see me through and after four months he was ready to throw me out. Later in the year 1918, Benshimol wrote me that he had not heard a "yip" out of the creditors.

There are three head of the fourteen head of horses owned by me and all of the hogs are gone. Benshimol told me several times that the creditors could not do anything.

Since I left Arizona in April, 1918, I have been working in the Government Shipyards at San Pedro, California. I am living there with my sister.

I wanted to take bankruptcy proceedings in November, 1917, as I have testified, but both Cowan and Benshimol insisted that I should not go into bankruptcy. Benshimol said I must [23] wait until after the four months had expired. I do not know why but I understand Cowan would then get everything. Cowan never asked me for a bill of sale or deed. I thought he had a right to take everything under his mortgages. Cowan knew I had other creditors, and talked about them on numerous occasions. He said he did not care what became of my other creditors. Benshimol during all this time was Cowan's attorney, he was not mine. He claimed to be working for Cowan.

As to the claim of the National Engraving Company, I had nothing to do with it. Benshimol himself ordered the cuts, handled the matter entirely and he should pay it. It is not a claim against me.

The other claims filed are as far as I recollect, correct.

The lease on the school section was turned over to H. A. Wicker in Benshimol's office. Wicker was then working for Cowan. The improvements on the school section were mortgaged to Cowan and this mortgage was made out the same time that the loan for \$2500.00 was made. The lease was assigned to Wicker. The improvements on this school section consist of a four wire fence, windmill and dirt tank and are worth about \$1000.00.

Frank Ramsey's wife transferred this lease to me. Fen S. Hildreth of Phoenix acted in this matter of the transfer and has a bill against me for \$28.20 but Cowan and Benshimol would not let me pay it.

The Hersley place is also mortgaged to Cowan; in fact everything I own was mortgaed to Cowan. I never made a schedule of the property when I turned it over to him.

The 20th Street property cost me about \$150.00 in improvements and I also paid \$20.00 on the contract to purchase.

The \$300.00 mortgage on the automobile was given to Cowan to protect this machine which I used in the business. [24] No money passed. As far as I know the foreclosure suit was filed to keep the other creditors out until Cowan was paid in full.

As to this suit, Benshimol himself prepared my answer. I afterwards wrote the Judge at Tombstone regarding the judgment and asked that no judgment be entered. Later the confession of

judgment was filed but no final judgment has been rendered as far as I know. There was no consideration for my turning over everything to Cowan. He only said he would make the business pay out his indebtedness and return it to me. Benshimol said, "To —— with the general creditors," and a lot more. They tried to freeze me out and lied to me from the jump. I never thought Cowan would double cross me like he did.

The notes are probably in Benshimol's office, and all returns and receipts from the business were delivered to Benshimol.

I never tried to remove the exempted property from the ranch. I did not know I was entitled to it until everything was settled up.

The Dairy Lunch, the 20th Street property, and the improvements were not in the schedules. They were sold before filing my petition in Bankruptcy. I was my understanding that the agreed price for the Dairy Lunch was \$500.00 and I do not know that Lapine actually paid therefore the sum of \$619.00.

EARL NICHOLS McKINNEY. [25]

I hereby certify that the above and foregoing is a true and correct statement of my testimony before the Referee in charge of the matter of Earl N. McKinney, Bankrupt, No. B-31, Tucson, at a hearing in said matter held in Douglas, Arizona, on the 21st day of October, 1918.

Dated this 27th day of October, 1918.

EARL NICHOLS McKINNEY.

[Endorsed on back:] Statement of Evidence of Bankrupt Taken October 21st, 1918. Filed this 30 day of Oct., 1918, at 2 o'clock P. M. F. H. Bernard, Referee in Bankruptcy.

Filed Jul. 19, 1921. C. R. McFall, Clerk. By Lella Spence, Deputy. [26]

In the United States District Court, in the District of Arizona.

No. B-31—TUCSON.

In the Matter of the Estate of EARL McKINNEY,
Bankrupt.

Special Report of Trustee.

F. H. BERNARD, Referee.

The undersigned Trustee in the above matter desires to report:

That from the assessment made on the creditors the trustee has been able to collect the total sum of\$92.40.

From which should be deducted.

Bill of Referee as rendered \$24.52.

Bill of Trustee as rendered \$29.14.

Total \$53.66.

Which leaves a balance available of \$38.74
now in hands of trustee.

That the Trustee has in his investigations of the affairs of said estate to determine the liability of William Cowan for which these funds have been raised has expended the following:

1918.

July 15th.	To 10 Gal. Gasoline trip to Tomb-	
	stone to examine records.....	\$3.50
	Four meals at Tombstone...	2.50
Oct. 1st,	24 Gals. Gasoline Trip to Tucson to	
	consult Referee with attorney	7.68
	Hotel Bill while in Tucson...	5.00
	8 Meals while in Tucson.....	6.40
Oct. 4th.	To U. S. Marshall serving Sub-	
	poenas.	4.06
Total.		\$29.14

That the Trustee did not take vouchers for the above expenditures but that he did expend the same and that the said sums are true and correct and actually expended by the trustee for and on behalf of the above estate.

That the results of my and my attorneys, investigation of the affairs between said William Cowan and the bankrupt is that at or about the 1st day of November, 1917, said Cowan, went into possession of all the property belonging to said bankrupt's estate as scheduled in the petition in bankruptcy, and took over some other property not scheduled in said petition and that the value of the property [27] so taken over by Cowan is valued at from \$35,000.00 to \$45,000.00.

That the claim of Cowan as he claims is about \$20,000.00 but the bankrupt in his examination claims that a payment or three payments were made to Cowan some time ago aggregating something

over \$2200.00 which do not appear from the records to have been credited up.

We find further that when Cowan took over this real estate and personal property as mortgagee or otherwise that no deeds of conveyance or bills of sale passed to him from the bankrupt and the bankrupt claims that Cowan was to first run the business until he was made good or paid and then he was to turn back the property to the bankrupt.

That Cowan started foreclosure of his mortgages in the Superior Court of Cochise County, State of Arizona, in a case entitled William Cowan vs. Earl N. McKinney, which has never been prosecuted to final judgement for order of sale of the mortgaged property.

That said Cowan has assumed ownership of all this property and is in possession of the same, using and asserting ownership without legal right or process.

That it looks to the Trustee that much of the property taken over by Cowan is not covered by any existent mortgage, as much of the personal property had been sold and changed by mortgagor after the execution of the mortgages as testified by bankrupt, and from all that the trustee can gather that Cowan is in possession of all this property without authority of law, and has converted the same to his own use unlawfully, and that a considerable sum ought to be recovered from Cowan on an accounting, for the benefit of the general unsecured creditors, and the trustee recommends that an action be instuted against said Cowan for an

accounting in the Superior Court of Cochise County, Arizona.

That in the trustee's opinion there will be sufficient funds coming from the unsecured creditors to prosecute this action.

(3) The Trustee asks that his account be allowed and ordered paid as set out herein and that the Referee authorize him to proceed with proper [28] action against William Cowan for an accounting and for such other order as is necessary to collect the assets of said bankrupt estate.

JOHN P. CULL,
Trustee.

Subscribed and sworn to before me this 22d day of November A. D. 1918.

[Seal]

H. D. PALMER,
Notary Public.

My commission expires June 1st, 1921.

The foregoing report and petition of the Trustee herein having been presented and duly considered by me, IT IS ORDERED that the account therein presented be approved and allowed and the items therein shown ordered paid, AND IT IS FURTHER ORDERED that the Trustee be, and he is hereby, authorized and directed to institute suit for accounting against William Cowan of Cochise County, Arizona.

Dated at Tucson, Arizona, this 25th day of November, 1918.

F. H. BERNARD,
Referee in Bankruptcy.

[Endorsed on back:] Filed this 25th day of November, 1918, at 10 o'clock A. M. F. H. Bernard, Referee in Bankruptcy. [29]

In the District Court of the United States for the
District of Arizona.

IN BANKRUPTCY—No. B-31 (TUCSON).

In the Matter of EARL N. McKINNEY, Bankrupt.

Order for Trustee to Bring Suit.

The trustee herein, John P. Cull, having on the 25th day of November, 1918, filed a special report showing among other things that as the result of a meeting of creditors of the above bankrupt held in the City of Douglas, Arizona, on the 21st day of October, 1918, he, as such trustee, had collected from a number of such creditors a fund for the prosecution of a suit for accounting against one William Cowan, a resident of Cochise County, Arizona.

And it further appears from such report that the trustee and his attorney are of the opinion that in order to properly protect the interests of the general creditors and of the bankrupt and further to properly collect the assets of this estate it is now necessary for the said trustee to commence an action against the said Cowan for an accounting in order that the said Cowan may be required to properly account for property of the bankrupt now held by said Cowan;

Now, on motion of C. V. Manatt, Esq., attorney for the trustee,—

IT IS ORDERED that John P. Cull, as trustee of the above-named bankrupt, be, and he is hereby authorized and directed to institute suit in the proper court against William Cowan of Cochise County, Arizona, for an accounting and to take such proceedings as may be necessary in the premises.

Dated at Tucson, Arizona, this 25th day of November, 1918.

F. H. BERNARD,
Referee in Bankruptcy.

[Endorsed on back:] Filed this 25th day of November, 1918, at 11:50 o'clock A. M. F. H. Bernard, Referee in Bankruptcy. [30]

In the United States District Court, in and for the
District of Arizona.

No. B-#31—TUCSON.

F. H. BERNARD, Referee.

In the Matter of the Estate of EARL N. McKINNEY, Bankrupt.

Report of Trustee John P. Cull, Douglas, Arizona.
To F. H. Bernard, Referee in Bankruptcy:

The undersigned trustee in the above matter desires to report in the above matter:

That since the last special report on the suggestion and authority of the referee this trustee did

start suit in the Superior Court of Cochise County, State of Arizona, as follows: J. P. Cull, Trustee, vs. William Cowan, Case No. —, for an accounting.

That after said case was started in the above court it was learned that Cowan was proceeding to sell all the property *the property* of the bankrupt under a judgement obtained by him on or about the 8th day of January, 1918, in a case wherein said William Cowan was plaintiff and the bankrupt Earl McKinney was defendant, in which case as heretofore reported, the defendant Earl McKinney was induced by Cowan and his Attorney David Benshemol to sign a confession of judgement, and finally after the above cause on our part was started and filed and summons issued and served on Cowan, Cowan and his attorneys, without notice to us, procured a judgement entry as prayed for and confessed by defendant in the case so started by him, and under this judgement, had proceeded to advertise and sell at sheriff's sale the property involved, all of which has been reported to you, and under your suggestion I started another cause entitled John P. Cull, Trustee, vs. William Cowan and the Sheriff of Cochise County, State of Arizona, asking for a restraining order and a temporary order was granted by Judge Shute then (2) sitting in Tucson restraining Cowan and sheriff from selling the property involved, at the time our Judge Alfred C. Lockwood being absent from the county of Cochise and State of Arizona. [31]

That as soon as John Lockwood returned from

his trip he promptly dissolved the temporary order so issued by Judge Shute and fixed the supersedeas bond in the penal sum of \$46,000.00, which I could have given but I thought it unwise to obligate myself in any such sum.

That at various times unknown to me or my attorneys it is presumed on the request and motion of the attorneys for the defendant Cowan demurrers to the complaints filed by me were sustained in both cases, and it appearing to me as well as my attorneys, that no progress was being made and none could be made in said cases both cases so started by me were dismissed without *predjudice* in said court, so that now there are no legal actions or other process pending in said matters against said Cowan.

It at this time appears to me that little if any use can be served the estate by bringing actions against Cowan in the Superior Court of Cochise County, State of Arizona.

I find from investigation, and information given me by the bankrupt Earl McKinney, that the following is about, the status of the affairs that existed between Cowan and McKinney:

That Cowan claimed in the action brought and before at about the 1st day of November, 1917, that McKinney owed him on promissory notes as follows:

(1) Note dated Jany. 8th, 1915, for	\$ 3500.00
Int. paid to Jan. 8th, 1916.	
(2) Note dated Jan. 5th, 1916	2000.00
No interest paid.	
(3) Note dated May 22d, 1916	2500.00
No interest paid.	
(4) Note dated Oct. 22, 1914	1660.00
Int. paid to Jan. 22d, 1915.	
(5) Note dated Jan. 15th, 1914	4600.00
Int. paid to Nov. 3d, 1915.	
(6) Note dated Feby. 18th, 1914	2000.00
Int. paid to Sept. 18th, 1914	

Total \$16260.00

That the interest claimed to have been paid on the above notes I am informed by the bankrupt was paid by him to Dixon & Co. in small payments by the month or at various times as he could spare the money, and those are all the indorsements that have been made on the notes that can be found, and that such interest payments so made and credited would not exceed something over \$1300.00, the true and exact amounts cannot now be learned. [32]

That an examination of the records in said suit of Cowans vs. McKinney shown by the claim of plaintiff and by confession of the defendant that there was due on said notes as set out in said action the following amounts:

On principal as evidenced by said notes	\$16260.00
Interest as allowed and computed in case	3641.68
Attys. fees allowed and agreed upon	500.00

Total \$19401.68

That under said judgement so obtained by collusion and misunderstanding by and between Cowan and McKinney in this respect that McKinney at no time in the transaction knew what his legal rights were as a mortgagor, and was led to believe by Cowan and his attorney that Cowan as mortgagee could at any time and at his option take over all the property claimed under the mortgages and thereby induced McKinney to turn over the bankrupt's property to Cowan on the 1st day of November, 1917, with the agreement that McKinney was to run the business and as soon as Cowan received sufficient from the business to liquidate his claims then the property was to be turned back to McKinney, and during the time McKinney was running the business, he was to receive a salary, and under which arrangement McKinney did give his time and work aided by his experience, to the business from Novr. 1st, 1917, to April 1st, 1918, five months, and during said time all the proceeds were turned to Cowan, and McKinney received little or nothing for his work, and in the meantime this suit was started against McKinney and the latter without legal advice, and in collusion with Cowan and his attorney induced McKinney to make the confession and agreements (page 4) for the judgement as was finally entered in the said case of Cowan vs. McKinney, and therefore I allege and charge that such judgement was fraudulent as to the general creditors.

That at the time said judgement was rendered and obtained by Cowan this trustee is informed and

believe from the information obtained by and through the bankrupt, that the following amounts were received by Cowan, and never credited on the indebtedness claimed to be due Cowan from McKinney and which McKinney is not certain of the exact amounts but are approximately:

(1) In Jan. or Feby. 1915, from sale of cattle near Phoenix by Wm. Stephens and Frank Ramsey two checks sent Cowan aggregating about \$ 1660.00

[33]

(2) In Jan. or Feby. 1915, cattle sold to Percy Ritterstone, Phoenix 800.00

(3) In 1918 the Dairy Lunch Restaurant sold to Chas. La Pine, Douglas .. 619.00

(4) Equity in dwelling and lot in City of Douglas, Arizona 500.00

(5) To lease of Section of State Lands and improvements thereon assigned to Cowan 1500.00

(6) To interest charged on the items for which credit should have been given at least 738.00

(7) To salary of Bankrupt for five months from Novr. 1st, 1917, to Apr. 1st, 1918 1000.00

(8) For the use and benefit of the Real Property and personal property from Novr. 1st, 1917, to present time property estimated to be of the value of at least \$25,000.00 ... 5000.00

Total \$11817.00

These amounts I am informed Cowan has had and at no time or place have I found where McKinney has been credited with any of the amounts herein set out and charged, and as Cowan has had the amounts and use of and possession of all this property, which he bid in at sheriff's sale on the 25th and 28th of November, 1919, on execution issued in said fraudulent action and judgement obtained as herein alleged for the sum of \$24,349.34. I feel that he should account for a fair rental on this property so taken over by fraud and false representations to the bankrupt McKinney, as the McKinney estate was entitled to the possession and use of this property during all this time and pending foreclosure (5) proceedings without question as to the validity of the judgement obtained by Cowan vs. McKinney, as under the law I am informed the mortgagor has the right of possession of mortgaged property until the same has been judicially sold, and time for redemption has expired, and title legally passes to the purchaser, but without regard to such right of McKinney or his estate Cowan has and did take over the whole of this property, and used the same and had any and all benefits of same during all this time from the 1st day of November, 1917, and should pay a reasonable rental therefor which I charge \$5000.00 as fair and reasonable, and which is due the estate of the bankrupt. [34]

The bankrupt claims and states that the actual value of this property so taken over by Cowan was of much greater value and of the fair value of

over \$45,000.00 but so far as the contract had between Cowan and McKinney when Cowan took over the property I do not believe that we have much right to enforce as the same was a parol and not enforceable as I am led to understand.

But these items totaling \$11,817.00 of which I was informed Cowan has received and had the benefit of and has at no time given the bankrupt the benefit of or credited him with on any of the notes of indebtedness or the so called judgement obtained, I claim is the property of the bankrupt's estate, and is due that estate, and should be paid in by Cowan for the benefit of the general creditors, and the bankrupt.

Wherefore I ask and pray that such order be made to said William Cowan citing him to show cause why he should not pay to the estate of Earl McKinney the said items set out herein and aggregating the said sum of \$11,817.00, and that upon any *showin* of said Cowan that an order be entered herein and judgement be made that said Cowan pay to me as trustee of said estate the said sum of \$11,817.00 and the costs of any and all proceeding had hereon, and for such other and further order of the above Court as is just and proper in the premises.

That any hearing demanded or asked for by said Cowan on the (6) matters herein alleged and set out that an order be made requiring said Cowan to make a sufficient and proper deposit for the expense of any and all hearing hereon.

JOHN P. CULL,
Trustee.

State of Arizona,
County of Cochise,—ss.

John P. Cull, of lawful age, being first duly sworn on his oath deposes and says that he is the trustee duly appointed and acting in the matter of the estate of Earl McKinney, bankrupt, and that he has read over the above report and states that the statements therein contained were obtained by investigation and information given me and I believe them to be true, and they are true, as to my best knowledge and belief.

JOHN P. CULL. [35]

Subscribed and sworn to before me this 4th day of December, 1919.

[Seal]

W. E. ABRAHAM,
Notary Public.

My commission expires Dec. 6th, 1921.

[Endorsed on back:] Filed this 5th day of Dec. 1919, at 2:30 o'clock P. M. F. H. Bernard, Referee in Bankruptcy.

Filed Jul. 19, 1921. C. R. McFall, Clerk. By Lella Spence, Deputy. [36]

In the District Court of the United States for the
District of Arizona.

IN BANKRUPTCY—No. B-31 (TUCSON).

In the Matter of EARL N. McKINNEY, Bank-
rupt.

**Order Citing Wm. Cowan to Appear Before
Trustee.**

At Tucson, on the 15th day of December, 1919.

Upon the application of John P. Cull, trustee of
said Bankrupt, IT IS ORDERED that William
Cowan, of Cochise County, Arizona, attend before
F. H. Bernard, one of the referees in bankruptcy
of this Court, at the law offices of Manatt & Stephen-
son, First National Bank Building, Douglas,
Arizona, on the 22d day of December, 1919, at 9:30
o'clock in the forenoon, to submit to examination
in relation to said bankruptcy, and that a summons
be issued and served upon each forthwith.

F. H. BERNARD,
Referee in Bankruptcy.

[Endorsed on back:] Filed this 15 day of Dec.
1919, at 2 o'clock P. M. F. H. Bernard, Referee in
Bankruptcy.

Filed Jul. 19, 1921. C. R. McFall, Clerk. By
Lella Spence, Deputy. [37]

In the District Court of the United States for the
District of Arizona.

No. B—31 (TUCSON).

In the Matter of EARL N. McKINNEY, Bank-
rupt.

Referee's Findings of Fact and Conclusions.

On December 22, 1919, William Cowan, of Cochise County, Arizona, appeared before the Referee in response to a summons theretofore issued and was examined regarding his several transactions with this Bankrupt, and a brief *résumé* of the transactions is as follows:

During the years 1914, 1915 and 1916 William Cowan loaned various sums of money to the bankrupt and at the time the several loans were made, mortgages were given, over certain of the bankrupt's property. The bankrupt paid the interest on several of the loans from time to time, but in the fall of 1917, he became involved, and after several conferences with Mr. Cowan and David Benshimol, Esq., attorney for William Cowan, an agreement seems to have been reached whereby Cowan was to take over all of the bankrupt's property and manage the same with a view of working out bankrupt's indebtedness. Cowan was also to pay the bankrupt one hundred and fifty dollars a month out of the milk business theretofore operated and owned by the bankrupt.

The property belonging to the bankrupt and covered by Cowan's several mortgages was turned

over to Cowan, and Benshimol acted as agent for Cowan in managing the business. On December 12, 1917, the bankrupt addressed a letter to William Cowan whereby he delivered possession of all stock and personal property held under the several mortgage listed in such letter and stated that he, the bankrupt, was unable to pay either principal or interest on the notes given Cowan. In this letter the bankrupt also stated that if Cowan would clear up an attachment on a certain Ford automobile owned by the bankrupt, the latter would release all claim to such automobile. This letter is signed by Earl McKinney and is duly acknowledged before David Benshimol, a notary public.

On January 2, 1918, Cowan, through his attorney David Benshimol, brought proceedings in the Superior Court of Cochise County, Arizona, to foreclose the several mortgages which he held on the bankrupt's property; and after some discussion, as to the amount due by the bankrupt to Cowan, [38] a stipulation was entered into between Cowan and the bankrupt whereby the bankrupt agreed to confess judgment for sixteen thousand two hundred and sixty dollars (\$16,260.00). and interest on said sum to the 3d day of January, 1918, at the rate of ten per cent per annum, such interest amounting to three thousand six hundred and forty-one dollars and sixty-eight cents (\$3,641.68) and also for the sum of five hundred dollars (\$500.00) attorney's fees and ten dollars (\$10.00) costs, making a total of twenty thousand four hundred and eleven dollars and sixty-eight cents (\$20,411.68),

which amount was to bear interest at the rate of ten per cent per annum from the 3d day of January, 1918. Accordingly, the bankrupt and Cowan on the 8th day of January, 1918, filed the following agreement:

“IT IS HEREBY STIPULATED AND AGREED by and between the Plaintiff and the defendant that judgment may be entered for the plaintiff for the sum of sixteen thousand two hundred and sixty dollars (\$16,260.00) principal and three thousand six hundred and forty-one dollars and sixty-eight cents (\$3,641.68) interest; interest computed at the rate of ten per cent per annum to January 3d, 1918, and an attorney's fee payable to David Benshimol, Esq., for five hundred dollars (\$500.00) and costs, and that execution may be issued herein as prayed for in the complaint. Signed: William Cowan and Earl McKinney.”

The records of the Superior Court of Cochise County show that on January 8, 1918, the following entry was made “Upon Consideration of the confession of Judgment filed herein by the defendant. It is by the Court ordered that upon presentation by the plaintiff of a formal *written* in the action and its approval and signing by the court Judgment will be rendered in favor of plaintiff and against defendant.”

No further proceedings apparently were taken to sell the property in accordance with the stipulation and this entry until about a year later, when the record shows a formal written judgment dated the 16th day of December, 1918, and signed by

Alfred C. Lockwood, Judge of the Superior Court of Cochise County. Pursuant to this formal judgment, Cowan some time thereafter proceeded to advertise the property for sale and the Trustee herein obtained a temporary injunction staying the sale, and this injunction was subsequently dissolved and on November 25, 1919, the personal property was sold to Cowan by the sheriff of Cochise County for fifteen thousand seven hundred and thirty-six dollars and fifty-five cents (\$15,736.55) and the real property sold on November 28, 1919, for eight [39] thousand six hundred and twelve dollars and seventy-nine cents (\$8,612.79).

One of the transactions between Cowan and the bankrupt concerns the sale of what was known as the Dairy Lunch in Douglas, and this business was sold by Cowan for the sum of six hundred and nineteen dollars and thirty-five cents (\$619.35) and an item of ninety-seven dollars and fifty-five cents (\$97.55) paid by Cowan for the account of the bankrupt and the balance of five hundred and twenty-one dollars and eighty cents (\$521.80) applied on one of the bankrupt's notes to Cowan for forty-six hundred dollars (\$4600.00). Cowan also paid in the neighborhood of one hundred and one dollars (\$101.00) for the release of the attachment on the Ford automobile and also received an assignment of the bankrupt's contract in what was known as the 20th Street property.

That between the months of May and September, 1916, the bankrupt sold a number of cattle off of

the ranch and the proceeds thereof were turned in to Cowan, who credited a portion of the proceeds of each sale upon several notes of the bankrupt and also credited an account for insurance on the bankrupt's property amounting to two hundred and twenty-two dollars and fifty cents (\$222.50). The total proceeds of such sale amounted to two thousand four hundred and twenty-four dollars and fifty-cents (\$2,424.50) and the total credits upon the notes and on account of the insurance amounts to one thousand and seventy-seven dollars and fifty cents (\$1077.50), leaving a balance of one thousand two hundred and sixty-five dollars and fifty-four cents (\$1265.54) to be credited by Cowan upon McKinney's indebtedness to him.

Credit has been given to the bankrupt by Cowan upon the several notes set out in the complaint for various amounts of interest paid by the bankrupt and in the computation of interest is also included the sum of eight hundred and eighty-five dollars and seventy-one cents (\$885.71) covering taxes paid by Cowan on the bankrupt's property for the years 1914, 1915, 1916 and 1917.

It appears that after the bankrupt turned over his property to Cowan in November, 1917, he was employed in the Dairy business by Cowan and paid a salary of one hundred and fifty dollars (\$150.00) a month, and it also appears that Cowan has accounted to the bankrupt for this salary up until the time that the bankrupt left Douglas in April, 1918.

No showing has been made by Cowan of any credit or other dispositions [40] in favor of the bankrupt of the balance of money remaining in Cowan's hands from the sale of the cattle and it is further shown that interest upon the total indebtedness as agreed upon under the stipulation of January 8, 1918, has been charged at the rate of ten per cent until the sale of the property in November, 1919, and there is no showing of any reason or cause for the delay on the part of Cowan and his attorney to sell the property by proper proceedings as soon as the entry for Judgment was entered by the Court on January 8, 1918.

The Trustee in bankruptcy has in his report filed in this matter on December 5, 1919, set out certain amounts which he claims should be credited to the bankrupt upon the several notes given to Cowan, but after a full consideration of the statements made by Cowan and of the records in the foreclosure suit before the Superior Court of Cochise County and also of other records submitted, there seems but little basis for such claims except in so far as the credits for moneys received from the sale of cattle and for the interest charged after possession was delivered by the bankrupt to Cowan are concerned.

One of the causes of action set out in the complaint embraced a note for the sum of three hundred dollars (\$300.00) which was secured by a chattel mortgage over the Ford automobile hereinbefore mentioned and the statement of the bankrupt with respect to this mortgage is to the effect that the

mortgage was given to protect the machine which was used by the bankrupt in his business and that he received no consideration for the mortgage. The statement of Mr. Cowan and other evidence submitted show that the automobile in question was attached and that the bankrupt released all claim to the machine upon the consideration of Mr. Cowan paying the attaching creditors claim against the machine, which amounted to about one hundred and one dollars (\$101.00) and which amount Mr. Cowan states he paid out of his own funds. The mortgage for three hundred dollars (\$300.00) was as far as the record shows given without any consideration whatever, and having released all claim in the machine to Cowan, the bankrupt should therefore have been credited with the sum of three hundred dollars (\$300.00) and interest upon Cowan's claim under the mortgage of this automobile. [41]

CONCLUSIONS.

After careful consideration of all evidence and statements submitted, the referee finds as follows:

1. That Cowan has not accounted to the bankrupt for the balance of the moneys received from the sale of the cattle or, to wit, for the sum of twelve hundred and sixty-five dollars and fifty-four cents (\$1265.54), which sum should have been credited upon the notes due by the bankrupt.

2. That the bankrupt has never received credit by Cowan for the amount of the chattel mortgage covering the Ford automobile and his account should therefore be credited to the estate of the sum of three hundred dollars (\$300.00) plus whatever in-

terest charge was made and in accordance with the judgment rendered in the Superior Court of Cochise County.

3. That as to the interest charged upon the indebtedness to Cowan from the 3d day of January, 1918, until the date of sale of the property, the bankrupt should be credited with interest at the rate of ten per cent upon the value of the personal property at the time it was turned over to Cowan, to wit, on the 12th day of December, 1917. The value of this property at such time and immediately prior thereto is estimated variously at between nineteen and thirty thousand dollars, but for the purpose of the present computations, the value of the property is taken at fifteen thousand seven hundred and thirty-six dollars and fifty-five cents (\$15,736.55), being the actual price paid by Cowan for the property at the time of sale in November, 1919. A computation of the interest upon the judgment from January 3d, 1918, to the date of sale of the personal property on November 25, 1919, shows that approximately three thousand four hundred and thirty-nine dollars and ninety-seven cents (\$3,439.97) of the total interest charge is made up of interest on the moneys claimed to be due upon the mortgages covering the personal property and this sum of \$3,439.97 should therefore be credited to the bankrupt's account as no interest should have been allowed or demanded after the bankrupt had delivered the property to Cowan and the bankrupt should also not be held responsibly for Cowan's

delays in proceeding under the stipulation and judgment in the foreclosure proceedings. [42]

The bankrupt should therefore be allowed credit for the sum of three thousand four hundred and thirty-nine dollars and ninety-seven cents (\$3,439.97) on account of interest charged as above set out, a further credit of the sum of twelve hundred and sixty-five dollars and fifty-four cents (\$1265.54) on account of balance due him under the sale of cattle and the further sum of three hundred dollars (\$300.00) with interest thereon from January 3, 1918, to November 25, 1919, on account of principal and interest charged under the mortgage covering the Ford automobile.

4. With regard to the interest charge made by Cowan upon the several mortgages covering the personal property and as allowed under the judgment of the Superior Court, reference is made to Brandenburg on Bankruptcy, 1917 edition, page 687, wherein the following language is used: "The taking possession of *mortgage* property by the *mortgage* and omission to sell within a reasonable time operates as a satisfaction of the debt to the extent of the value of the property when the mortgagee took possession." Reference is also made to the case *In re Haake*, Federal Case No. 5883, in which it was held that where personal property had been taken by a mortgagee, even though he had expended money on it for repairs and lost money by its use so that its value became less by reason of such use, the mortgagee must, nevertheless, credit the indebtedness of the mortgagor with the value of the

property at the time of its taking over by the mortgagee.

From the above findings and conclusions, it appears that the bankrupt is entitled to certain credits which have not been allowed him and which should in good conscience have been allowed him before he was induced to enter into the stipulations filed in the Superior Court of Cochise County, on January 8, 1918, and which stipulation is the basis for the judgment rendered against him. Whatever may have been the motives of the bankrupt or Mr. Cowan or his attorney in bringing about the foreclosure proceedings, after they had procured from the bankrupt on December 12, 1917, an absolute delivery to Mr. Cowan of all property covered by the several mortgages, the creditors of the bankrupt are entitled to the fullest protection and to a full investigation of the transactions and business dealings between Mr. Cowan and the bankrupt, especially in view of the bankrupt's statements, after he was declared bankrupt and also in [43] view of the fact that both Cowan and his attorney were fully advised as to the bankrupt's financial condition as early as November 1, 1917, and however willing the bankrupt may have been to stipulate as to the amount due by him under the several mortgages, such a stipulation should not operate to defeat his creditors and at the same time enable Mr. Cowan to have both the possession of the property and the fruits thereof from November 1, 1917, and also to charge interest on the indebtedness from January 3, 1918, until the sheriff's sale in November, 1919, and while the

referee appreciates the desire of both Mr. Cowan and his attorney to fully protect him and his lien against the property, the interest of the other creditors of this bankrupt are entitled to consideration which has not been given them in this case.

The total amount of credits which should have been allowed the bankrupt as a result of his dealings with Mr. Cowan is the sum of five thousand and thirty-eight dollars and forty-one cents (\$5,038.41) and an order is hereby made directing the said William Cowan to show cause why he should not pay over to the estate of this bankrupt the sum of five thousand and thirty-eight dollars and forty-one cents (\$5,038.41), and such order is hereby made returnable in the City of Douglas, Cochise County, Arizona, on the 8th day of March, 1920, at 10 o'clock A. M., at which time the referee will be present in the City of Douglas, at the office of Manatt and Stephenson for the purpose of hearing said matter.

Dated at Tucson, Arizona, this 16th day of February, 1920.

F. H. BERNARD,
Referee in Bankruptcy.

[Endorsements on back:] Referee's Findings and Conclusions. Filed this 16 day of February, 1920, at 10 o'clock A. M. F. H. Bernard, Referee in Bankruptcy.

Filed Jul. 19, 1921. C. R. McFall, Clerk. By Lella Spence, Deputy. [44]

In the District Court of the United States for the
District of Arizona.

No. B-31 (TUCSON).

In the Matter of EARL N. McKINNEY, Bankrupt.

**Special Appearance and Objections Filed by
William Cowan to Referee's Show Cause
Order, Dated 16th Day of February, 1920.**

Comes now William Cowan, ordered by F. H. Bernard, Referee in the above-entitled matter, to show cause why he should not pay over to the estate of the above-named bankrupt a certain sum of money, specially appearing under protest for the purposes of this plea and no other objects, to the jurisdiction both of said court and said Referee in the premises, and states herein as his grounds of objection the following:

1. That the proceeding is irregular because no petition has been filed by the Trustee relative to the matters set forth in the show cause order.

Corpus Juris, Vol. 7, page 210, section 317.

In re Ballou, 215 Fed. 810-813.

2. Because the subject matter set forth in the show cause order shows clearly that fact, and the said William Cowan does assert title to the sums of money asked to be accounted for therein; and the said William Cowan claims said funds as his own and adversely to the Trustee and to the estate of the bankrupt.

Babbitt vs. Dutcher, 216 U. S. 102-113.

Jaquith vs. Rowley, 188 U. S. 620.

3. Because the said William Cowan does not

consent that the matters involved in the show cause order shall be heard before said Referee and further alleges that the statement of facts set forth in said show cause order do not lay foundation for a summary proceedings, but, on the contrary, disclose that the personal property which is the subject of the said Referee's findings of fact and conclusions of law, was held under liens of mortgages, for valuable consideration, given by the bankrupt more than 4 months prior to the date of his adjudication in bankruptcy, and in no event less than approximately two years prior to said adjudication. [45]

4. Because the Referee's findings of fact and conclusions of law upon which his show cause order is based are erroneous in fact and in law, and are inequitable and unjust.

(a) Because the said William Cowan has taken charge of, fed and cared for the cattle which constitute the greater part of the chattels involved, and has improved the condition and increased the number thereof, and said cattle thus improved in condition and increasing in number 30% were included in and sold under the foreclosure sale; because said Cowan is entitled to interest on the amount of his judgment; because the automobile mentioned by the Referee was said Cowan's property, and the mortgages thereon not included in the amount of the judgment.

(b) Because the Trustee has failed for a period of nearly two years to redeem the property from the mortgages of said Cowan, although every opportunity was given to him to do so.

(c) Because the Trustee in this cause has twice brought action against the said William Cowan in the State Courts. In the first, seeking to recover from said Cowan the value of the property upon which the accounting requested in the show cause order is based, same also being an action for account and numbered 2818 on the Docket of the Superior Court for the County of Cochise, State of Arizona, and entitled "John P. Cull, Trustee, vs. William Cowan," and in the second action attempting to enjoin the said William Cowan from selling under his judgment of foreclosure, said suit being entitled "John P. Cull, Trustee, vs. William Cowan, Earl McKinney and James McDonald, Sheriff of Cochise County, numbered 2861 on the Docket of said Superior Court, reference to both of which actions is hereby made; and because after the said William Cowan had demurred to both of said actions, and the demurrers to both actions had been sustained by said Superior Court, and after a notice of appeal had been given by the said John P. Cull, Trustee, to the Supreme Court of the State of Arizona, against the will and without the consent of the said William [46] Cowan, the said Trustee dismissed both of said actions; that the actions of said Trustee relative to the said William Cowan in all of said matters is malicious, inequitable and unjust, and has caused the said William Cowan to expend large sums of money in the employment of

counsel to defend said actions in said Superior Court.

Corpus Juris 7, page 259.

Wall vs. Cox, 181 U. S. 244.

Robinson vs. White, 97 Fed. 33.

(d) Because the Referee in the statement of facts upon which he based his conclusions of fact has shown clearly that this is a matter that cannot be litigated as a summary matter before him.

WILLIAM COWAN,

By His Attorney, David Benshimol.

[Endorsements on back:] Filed this 9th day of March, 1920, at 10:30 o'clock A. M. F. H. Bernard, Referee in Bankruptcy.

Filed Jul. 19, 1921. C. R. McFall, Clerk. By Lella Spence, Deputy. [47]

In the District Court of the United States, for the
District of Arizona.

IN BANKRUPTCY—No. B-31 (TUCSON).

In the Matter of EARL N. McKINNEY, Bankrupt.

Order Overruling Petition of Trustee.

At a Court of Bankruptcy held in the City of Tucson, County of Pima, State of Arizona, on the 8th day of May, 1920. Present, F. H. BERNARD, Referee.

It appearing that William Cowan has appeared herein on the 9th day of March, 1920, in response to an order to show cause and that such appearance was made specially for the purpose of objecting to

the jurisdiction of this Court to hear and determine the matters set out in said order to show cause, and it further appearing that the claim of William Cowan to the proceeds of the sale of certain property is adverse to the claim of the Trustee thereto—

IT IS ORDERED that the petition of the Trustee herein asking for an order requiring the said William Cowan to turn over all the proceeds of the sale of the property of the bankrupt to said Trustee, be, and the same is, hereby denied for want of jurisdiction of the Referee to hear and determine the claim of said William Cowan to such proceeds.

F. H. BERNARD,
Referee in Bankruptcy. [48]

In the District Court of the United States for the
District of Arizona.

IN BANKRUPTCY—No. B-31 (TUCSON).

In the Matter of EARL N. McKINNEY, Bankrupt.

Certificate by Referee to Judge.

I, F. H. Bernard, one of the Referees of said Court in Bankruptcy, do hereby certify that in the course of the proceedings in said cause before me the following question arose appurtenant to the said proceedings:

“Whether on the record of this case William Cowan, the respondent to a petition filed herein by the Trustee and who has appeared especially herein to interpose a preliminary objection to the jurisdiction of this Court, is an adverse

claimant to the funds resulting from the sale of certain property formerly belonging to the Bankrupt, and which proceeds are claimed by the Trustee as part of said Bankrupt's estate."

I hand up herewith a summary of the testimony and evidence relating to the question and the findings of the Referee thereon.

And the said question is certified to the Judge for his opinion thereon.

Dated at Tucson, Arizona, this 17th day of May, 1920.

F. H. BERNARD. [49]

**Statement of Testimony of William Cowan Taken
Upon His Examination Before the Referee
Herein on December 22, 1919.**

Cowan had loaned various sums of money to Earl N. McKinney, the bankrupt herein, and these transactions began in the year 1914 and continued for several years thereafter and were represented by notes and mortgages given by McKinney as set out in detail in the complaint filed by Cowan against McKinney in the Superior Court of Cochise County, Arizona, in January, 1918. In this case judgment was rendered in favor of Cowan in pursuance to a confession of judgment filed by McKinney on January 8, 1918, after an agreement had been reached between Cowan and McKinney as to the amount due by McKinney. The formal judgment in this case was filed and signed on December 16th, 1918.

In the early part of December, 1917, McKinney turned over to Cowan all property covered by the several mortgages and under arrangements had

between them, McKinney was to receive a salary of \$150.00 a month out of the dairy business formerly operated by him. Cowan took charge of and operated the business and took over the property of McKinney from that time on and paid McKinney his salary until the latter left Douglas in the month of April, 1918.

Cowan also received various amounts from the sale of cattle by McKinney as follows:

May 6, 1916.....	\$ 581.50
September 30, 1916	543.00
September 30, 1916	1300.00
<hr/>	
Total.....	\$2424.50

Which amounts he credited on McKinney's indebtedness, retiring one note for \$450.00 dated June 6th, 1914, and one note for \$463.66 dated May 22, 1916, and he also paid insurance on the property, the premium thereof amounting to \$222.50. A further sum of \$619.35 was received by Cowan from the sale of the "Dairy Lunch," formerly belonging to McKinney, and from the proceeds thereof Cowan paid an item of \$97.55 for furniture purchased by McKinney and applied balance of such moneys or the sum of \$521.80 on a certain note for \$4600.00 given to him by McKinney. [50]

The contract or agreement for purchase of what was known as the 20th Street property was assigned by McKinney to Cowan, after the former had made two small payments thereon and Cowan paid out of his personal fund the balance of the purchase price of said property. No funds of the ranch milk ac-

count were used by Cowan in the purchase of this property.

A number of hogs on the ranch were owned by McKinney before Cowan had taken over the property and there were only three hogs on the ranch when Cowan took it over.

As to the auto-truck owned by McKinney, he turned over to Cowan on December 12th, 1917, when Cowan paid off the attachment on this truck.

Cowan also paid certain taxes on the property for the years 1914-15-16 and 17. Total taxes amounted to \$885.71, which amount was taken into account in the computation of the interest due by McKinney. Judgment was taken against him under the stipulation or confession previously referred to.

Cowan thereupon handed to the Referee a statement of the salary account of McKinney and agreed to give the referee a copy of the letter written to him by McKinney, December 12, 1917, turning over all property to Cowan.

Cowan purchased all the personal property under the foreclosure proceeding at a sale thereof on November 25, 1919, for the sum of \$15,735.55, and he purchased the real property under such proceedings on November 28, 1919, for the sum of \$8,612.79. Cowan states that he owes nothing whatever to McKinney and claims the proceeds of the sale as his own property.

[Endorsements on back:] Filed Jul. 19, 1921.
C. R. McFall, Clerk. By Lella Spence, Deputy.
[51]

In the District Court of the United States for the
District of Arizona.

No. B-31—TUCSON.

In the Matter of EARL N. McKINNEY, Bank-
rupt.

**Order for Return of Files to Referee With
Instructions.**

It is ordered that the clerk of this court return the papers and files in this case to the Referee in Bankruptcy at Tucson, with instructions to proceed to decide the questions involved without the advice of the Court.

I, C. R. McFall, clerk of the above-entitled court, hereby certify that the above and foregoing is a true copy of an order of court entered on the minutes, in the above-entitled matter, this 26th day of June, 1920.

WITNESS my hand and the seal of said court affixed this 26th day of June, 1920.

[Seal]

C. R. McFALL,
Clerk.

[Endorsements on back]: Filed June 28th, 1920.
F. H. Bernard.

Filed Jul. 19, 1921. C. R. McFall, Clerk. By
Lella Spence, Deputy. [52]

In the District Court of the United States for the
District of Arizona.

IN BANKRUPTCY—No. B-31 (TUCSON).

In the Matter of EARL N. McKINNEY, Bank-
rupt.

Record of Proceedings Had Before Referee.

RECORD OF PROCEEDINGS HAD BEFORE
F. H. BERNARD, REFEREE IN CHARGE
OF THE ABOVE-ENTITLED MATTER.

1918.

April 12th, Received from the United States
 District Court at Tucson, Ari-
 zona, the following documents:
 Order of Adjudication and Ref-
 erence, two copies of schedules.
 Filed same.

Ordered notice to creditors of
meeting on April 25, 1918, at
10 A. M. Mailed notice to cred-
itors and copy of notice to Bis-
bee Daily Review for publica-
tion.

“ 17th. Filed publisher's affidavit of pub-
 lication of notice of first meet-
 ing of creditors.

“ 25th. First meeting of creditors held.
 Present, Earl N. McKinney, the
 bankrupt, O. T. Richey, repre-
 senting the Bankrupt, George

1918.

M. Roark, attorney for creditors, and T. H. McKinney, a creditor.

Upon the call for claims, the following claims were filed and being duly proved were allowed:

D. M. Dwyer.....	\$187.00
Barnhart & Carson..	490.00
J. E. Hood.....	331.37
C. M. Seaman.....	54.95
D. P. Dwyer.....	396.60
Charles R. Scott.....	110.50
L. A. Smith.....	1818.80
John P. Cull.....	106.50
Thomas H. McKinney.	86.40
I. H. Maddux.....	155.90
The China Palace Co.	106.55
Jacob Scherrer.....	600.00

Upon the call for the election of a Trustee, John P. Cull of Douglas, Arizona, was unanimously elected Trustee and his bond fixed in the sum of \$500.00 until further order of the Trustee.

The following gentlemen were then appointed Appraisers: B. A. Packard, E. C. Piper and G. O. Bohanan, all of Douglas, Arizona. [53]

April 25th.

No examination of the bankrupt being desired at this time, the

1918. meeting was continued until
May 10th, 1918, at 2 P. M.
Notified Trustee of his appointment.
- “ 27th. Received and filed acceptance of
appointment by Trustee.
- “ 30th. Filed bond of Trustee and order
approving same with the Clerk
of the United States District
Court, at Tucson, Arizona.
- May 3d. Filed proof of debt of A. Salem
for \$24.10.
- “ 9th. Filed proof of debt of H. H.
Hotchkiss for \$257.83.
- “ 10th. Continued meeting of creditors
held. No creditors present.
Allowed the following claims:
A. Salem.....\$24.10
H. H. Hotchkiss.....257.83
Meeting continued until June
21, 1918, at 2 P. M.
- “ 11th. Filed proof of debt of Douglas
Vulcanizing Company, for
\$53.65.
- “ 16th. Filed proof of debt of National
Engraving Company, for \$22.99.
- “ 22d. Filed proof of debt of John Deg-
nan for \$70.20.
- June 21st. Continued meeting of creditors
held. No creditors present.

1918. Allowed the following claims:
 Douglas Vulcanizing
 Company... ..\$53.65
 National Engraving
 Company... .. 22.99
 John Degnan..... 70.20
 Meeting continued until July 20,
 1918, at 2 P. M.
- July 6th. Filed proof of debt of W. M. Mc-
 Coy for \$52.25.
- “ 17th. Filed proof of debt of The McNeil
 Company for \$140.00.
- “ 20th. Meeting continued to August 21st,
 1918, at 2 P. M.
- August 3d Filed the following claims:
 John P. Cull.....\$106.95
 Henry Elvey..... 24.80
 Safford Hay & Grain
 Co..... 60.00
 Bassett Lumber Com-
 pany..... 39.80
 Bassett & Frist..... 86.25
 Filed report of Trustee. [54]
- August 21st. Meeting of creditors continued to
 September 21st, 1918, at 2 P. M.
- September 14th. Filed proof of debt of Lane Broth-
 for \$100.00.
- “ 21st. Meeting continued to October 21st,
 1918, at 2 P. M.
- October 1st. Had a long interview with John P.
 Cull, Trustee, and C. V. Manatt,
 Attorney, in City of Tucson, re-

1918. regarding the examination of the
Bankrupt and also of William
Cowan and David Benshimol,
his attorney.

“ 4th. Filed supplemental report of Trustee.

“ 11th. Made and entered order for further examination of the Bankrupt, and also for examination of William Cowan and David Benshimol, both of Douglas, Arizona.

Obtained Subpoenas from the Clerk of the United States District Court for William Cowan and David Benshimol and mailed same with Deputy United States Marshal at Bisbee for service.

Examination of these parties set for October 21st, 1918, at 9:30 A. M. in Douglas, Arizona.

“ 21st. Meeting of creditors held at Douglas, Arizona. Present, Earl N. McKinney, the Bankrupt, John P. Cull, Trustee, C. V. Manatt, attorney for Trustee and David Benshimol.

Allowed the following claims:

W. M. McCoy.....\$52.25

The McNeil Company.140.00

1918.	John P. Cull.....	106.95
	Safford Hay & Grain	
	Co.....	60.00
	Bassett Lumber Com-	
	pany.....	39.80
	Bassett & Frist.....	86.25
	Henry Elvey....	24.80

Filed return of service of Subpoenas upon David Benshimol and William Cowan.

It appearing that William Cowan has failed to appear in pursuance of the Summons issued, the hearing of the testimony of the bankrupt was then taken up and the statements of his testimony appear of record herein on the date of October 30th, 1918.

The attorney for the Trustee announced that he did not care to examine Mr. Benshimol until he had an opportunity of examining Mr. Cowan and the examination was therefore continued until 2 o'clock. [55]

October 21st. At 2 P. M. Present, John P. Cull, Trustee, Earl N. McKinney and C. V. Manatt, attorney for Trustee.

It appearing that Mr. Cowan had failed to respond to the summons issued herein and it

1918.

also appearing that the United States Marshal had failed to tender Mr. Cowan his fees and mileage, the examination of Mr. Cowan was continued until some future date, as was likewise the examination of Mr. Benhsimol.

Meeting continued until November 21st, 1918, at 2 P. M.

“ 30th. Filed statement of testimony given by Earl N. McKinney, the bankrupt, at the hearing on October 21st, 1918.

November 21st. Meeting continued until further notice.

“ 25th. Filed special report of the Trustee requesting an order to bring suit against William Cowan and made and entered order authorizing the Trustee to file suit.

1919.

December 5th. Filed report of Trustee.

“ 15th. Made and entered order for the examination of William Cowan, such examination to be held in the City of Douglas, on December 22d, 1919, and caused subpoena to be issued and handed to United States Marshal for service.

1919.

- “ 20th. Filed Marshal's return of service of subpoena on William Cowan.
- “ 22d. Meeting held in Douglas, Arizona, for the purpose of examining William Cowan in pursuance to subpoena issued on December 15th. Present, William Cowan, David Benshimol, his attorney, John P. Cull, Trustee, and C. V. Manatt, attorney for Trustee.

William Cowan was thereupon examined and a statement of his testimony is filed herein.

Upon the conclusion of the testimony of William Cowan, the meeting was continued until further notice.

1920.

February 16th. Filed Referee's findings and conclusions and made and entered order requiring William Cowan to show cause before the Referee in Douglas on March 8th, 1920, why he should not turn over certain property to the Trustee.

Made copy of order to show cause to David Benshimol, attorney for Cowan, and copy to C. V. Manatt, attorney for Trustee. [56]

1920.

March 6th.

Made and entered order continuing hearing on the order to show cause until March 9th, 1920, 10 A. M.

“ 9th.

Hearing upon return of order to show. Present, William Cowan, David Benshimol, attorney for William Cowan, John P. Cull, Trustee, and C. V. Manatt, attorney for Trustee

Filed objection of William Cowan to the jurisdiction of the Referee herein to hear and determine his claim against the estate of this bankrupt, and the matter so submitted was taken under advisement.

David Benshimol, attorney for Cowan, stated that he desired to be heard before the United States Court on the question of jurisdiction of the Referee in the event that this question was certified up to the District Judge.

It appearing that an item of Three Hundred Dollars (\$300.00) for an automobile belonging to the bankrupt and by him delivered to William Cowan, was contained in the order to show cause, requiring Cowan to

1920. pay over certain sums to the Trustee and it further appearing that this item was not included in the Judgment rendered in the Superior Court in Cochise County in the suit to foreclose certain mortgages brought by William Cowan against Earl N. McKinney, the Bankrupt.

It is ordered that the order to show cause heretofore issued and filed on the 16th day of February, 1920, be and the same is hereby amended so as to strike therefrom the paragraph requiring William Cowan to credit the estate of the Bankrupt with the sum of Three Hundred Dollars (\$300.00) and that the meeting be continued until further notice.

May 17th. Certified the question raised in this proceeding to the District Judge of the District Court of Arizona for his opinion.

June 28. Received from Clerk of U. S. District Court Order of the U. S. District Judge *instruction* Referee to proceed to decide the questions involved in this case without the advise of the Court.

1921.

- May 16. Made and filed findings of fact and conclusions of law in the above-entitled matter and mailed copy of such findings of fact and conclusions of law to David Benshimol, Esq., Douglas, Arizona, attorney for William Cowan and to C. V. Mannatt, attorney at law, Douglas, Arizona, attorney for Trustee. [57]
- July 18. Filed petition of William Cowan for a review of Referee's findings of fact and conclusions of law, dated May 16th, 1921, and allowed petition for review.
- July 19. Filed certificate of review and all papers pertinent to such review with the Clerk of U. S. District Court, at Tucson, Arizona.

[Endorsements on back]: Filed Jul. 19, 1921.
C. R. McFall, Clerk. By Lella Spence, Deputy.
[58]

In the District Court of the United States in and
for the District of Arizona.

No. B-31 (TUCSON).

In the Matter of EARL N. McKINNEY, Bankrupt.

Referee's Findings of Fact and Conclusions of Law.

ON WILLIAM COWAN'S CITATION.

That after thorough investigation of the matters
of the above estate I find the following facts:

I.

That the estate of the bankrupt, at the time of
filing his petition and the adjudication thereon by
the Court, consisted of lands, dairy stock and range
stock in Cochise County, State of Arizona, esti-
mated to be of a value of from \$19,000.00 to \$30,-
000.00, and for some time prior to the bankrupt
proceedings this land and stock had been left with
William Cowan, who claimed to have certain mort-
gage liens on all the said property, which said liens
on investigation were, so far as this proceeding is
concerned, in existence and of record for more
than four months prior to these proceedings.

II.

That the arrangement between the bankrupt and
Cowan was substantially, that Cowan was to have
and remain in possession of and run the business
with the bankrupt employed, in the active business,
until such time as the business should pay off Cow-
an's indebtedness, and then the property involved
was to be turned back to the bankrupt, as his own
free and clear of all liens, in so far as Cowan was

concerned, and this arrangement was carried out, in so far as turning over the property to Cowan, and the employment of the bankrupt, up to a short time before the bankrupt filed his petition in bankruptcy in this court, and more than four months after the arrangement was had and made, this arrangement being abrogated and abandoned by the bankrupt owing to dissatisfaction on his part. [59]

III.

That Jan. 2d, 1918, and during the time that the arrangement set out in paragraph two hereof was in force and being worked out by the parties concerned, William Cowan, through his attorney David Benshimol, started suit in the Superior Court of Cochise County, State of Arizona, to foreclose the various mortgages held by Cowan on the property of the bankrupt, and on the 8th day of January, 1918, under a confession by bankrupt obtained by Cowan and his attorney, and on this suit and on the said confession an entry was made by the Court, and as a part of the Court's minutes that on presentment of a proper written judgment, judgment would be entered in favor of plaintiff Cowan and against defendant Earl N. McKinney, the bankrupt, as follows: Principal sum due \$16,260.00; interest \$3,641.68; interest on that sum at the rate of 10% and allowed an attorney's fee to David Benshimol in the sum of \$500.00 and the costs of suit, and that execution may issue against the property foreclosed, and that no further proceeding was had on said matter until about a year later, when the formal written judgment was entered, dated Dec. 16, 1918,

and signed by Alfred C. Lockwood, Judge, and the Trustee obtained a temporary restraining order, restraining the sheriff of Cochise County from selling the property, which said restraining order was in a short time dissolved, and by order of sale issued on the 25th day of November, 1919, the personal property of the bankrupt was sold at sheriff's sale to William Cowan for the sum of \$15,736.55, and on the 28th day of November, 1919, the real estate was sold to Cowan for the sum of \$8,612.79 making a total sum received for the property on such sales of \$24,349.34, being the sum due Cowan on his judgment with 10% interest from Jan. 8th, 1918, and during all this time from the 8th day of Jan. 1918, and prior thereto for about four months Cowan had been in full possession of all the property and enjoyed the proceeds therefrom, without giving any credit on the judgment for the use of the property, and charging full interest up to the day of sales. [60]

IV.

That the Trustee has charged that Cowan failed to give credit to the bankrupt, for checks sent him on sales of cattle made by the bankrupt, and failed to give credit to the bankrupt for different properties taken over by Cowan, and so under said charges and allegations of the Trustee I on or about the 12th day of Dec. 1919 had Cowan subpoenaed to appear before me on December 22d, 1919, at Douglas, Arizona, for examination, where he, Cowan, appeared and submitted to examination by myself, and from such examination I found that during

the year 1916 the bankrupt had sold stock presumably covered by Cowan's mortgages in the sum of \$2,424.50, which the Bankrupt Cowan admitted had turned over to him said amount of \$2,424.50 from such sales of stock and in an examination of Cowan he could only show where he had credited the bankrupt with the sum of \$1158.92, leaving a balance unaccounted for which Cowan admitted he had received of \$1265.58.

V.

That during all the time Cowan allowed his Court proceedings to remain idle, he was in the possession of and had the use of the entire property of the bankrupt, and when the sheriff's sales were had in Nov. 1919, said Cowan bid in the property for the sum of \$24,349.34, that being the amount due Cowan on his judgment with 10% interest from its date to the date of sales, and as a fact the use and benefits of the property as had by Cowan should have more than paid the interest, especially the delay in selling the property was from the fault of said Cowan, and the accumulated interest during that time would amount to the sum of \$3,439.97, and the Referee finds that Cowan should account for the bankrupt's estate or the trustee for the further sum of \$3,439.97.

VI.

That from the showing and testimony of said Cowan at such hearing, I came to the conclusion that the foreclosure of the court inculding the automobile in said matter in the Superior Court of Cochise County, Arizona, was not a *bona fide* trans-

action, and held [61] that Cowan should account for the value of the automobile in the sum of \$300.00, and on said hearing made specific findings, and issued a citation thereon and served the same on Cowan to show cause why he should not pay in to the Trustee the total sums so found due from him for money and property had and received, from the bankrupt estate, and not credited and accounted for, and said citation held him to appear before me at the City of Dougals, Arizona, on the 9th day of March, 1920, at which time and place said Cowan appeared, with his attorney, and proceeded to make a showing why he should not account for the value of the automobile in the sum of \$300.00, among other things, which he asked for relief and upon his showing I reduced my findings in the sum of \$300.00, as he was able to show that he had an assignment of the rights to the automobile in his paying the cost of the claims and suit in attachment against it.

VII.

That he appeared therein and plead to the merits of said citation and obtained affirmative relief thereon, and at the same time he objected to the jurisdiction of the Referee or this Court trying said matters in a summary proceeding, however having submitted himself to the jurisdiction of the Referee and this Court in the matter, as herein stated, said objection to jurisdiction and this proceeding was by the Referee overruled and the Referee found that Cowan had received and not accounted for moneys and property of the bankrupt estate, which should

have been credited on the obligations of the bankrupt, and the judgment against him in the total sum of \$4,705.55, and finds that such sum is due from said William Cowan to the trustee for the benefits of the general creditors of said estate.

On the above facts as herein found the Referee finds the following conclusions of law:

I.

That there being no property right or right to possession of property involved in this proceeding, and it being an inquiry for [62] the amount of property and money received by Cowan and unaccounted for, that this summary proceeding is proper and right, as all the rights and things herein involved is under the jurisdiction of this Court as a Bankrupt Court.

II.

That if any judicial question ever existed the same was waived by Cowan when he came in voluntarily and plead to the merits of the citation, and obtained affirmative relief under his plea and showing made as shown in the findings heretofore made.

III.

That as a matter of law Cowan has received in money and property belonging to the bankrupt estate the sum of \$4,705.55, which sum and amount so received he has failed to account for, or credited to the bankrupt or his estate.

IV.

That such sum of \$4,705.55 is the property of the estate and should be paid over to the trustee for

the benefit of the estate and distributed according to law.

V.

That said Cowan having failed to turn over or pay said sum to the trustee or anyone for him, this Court should order the matter docketed, and render judgment therefor, against said William Cowan in favor of John P. Cull, Trustee, and order execution therefor.

Done this 16th day of May, 1921.

F. H. BERNARD,
Referee in Bankruptcy.

[Endorsements on back]: Filed this 16 day of May, 1921, at 2 o'clock P. M. F. H. Bernard, Referee in Bankruptcy.

Filed Jul. 19, 1921. C. R. McFall, Clerk. By Lella Spence, Deputy. [63]

In the District Court of the United States for the
District of Arizona.

No. B-31 (TUCSON).

In the Matter of EARL N. McKINNEY, Bankrupt.

Petition for Review.

PETITION OF WILLIAM COWAN FOR A
REVIEW OF THE REFEREE'S FIND-
INGS OF FACT AND CONCLUSIONS OF
LAW ON CITATION OF THIS PETI-
TIONER DATED MAY 16, 1921.

Your petitioner respectfully represents:

1.

That he is the person named in the proceedings herein entitled "Referee's Findings of Fact and Conclusions of Law on William Cowan's Citation," dated May 16, 1921.

2.

That your petitioner prays the Honorable Court to review said proceedings and the whole thereof.

And your petitioner further represents:

3.

That the referee is without jurisdiction and that this Court is without jurisdiction to hear, consider or determine the matters sought to be adjudged in the proceedings before the Referee and this court is without jurisdiction to hear or determine any of the matters and things set forth in the Referee's Findings of Fact and Conclusions of Law dated May 16, 1921.

4.

That said Referee is without jurisdiction and the Court is without jurisdiction of the person of your petitioner in the premises.

5.

That your petitioner has not submitted himself to the jurisdiction of the Referee, nor to the jurisdiction of this Court, and has not consented that the right of property in said proceedings involved, [64] should be determined by said Referee or by this Court, upon summary proceedings herein.

6.

That your petitioner especially denies the jurisdiction of said Referee and especially denies and

objects to the jurisdiction of the Court, to proceed further herein.

7.

That said proceedings before the Referee were arbitrary and unlawful in that same were not initiated upon any petition or showing made by the Trustee.

8.

That said proceedings before the Referee and any order or findings sought to be predicated thereupon, were arbitrary and unlawful in that your petitioner's claim to the property and moneys sought to be taken by the Referee, were adverse to the bankrupt.

9.

That it appears from the findings and conclusions that the Referee is estopped for laches from asserting any claim in behalf of the bankrupt's estate, by reason of failure of the Trustee to redeem the mortgaged property.

10.

That it appears from the findings of the Referee that an attempt is made in summary proceedings to effect and adjudicate an accounting between petitioner and the bankrupt.

11.

That it appears from the findings of the Referee that an attempt is made to adjudicate matters and issues that can only be determined in a plenary action.

12.

That it does not appear from the proceedings

that this petitioner holds any property or moneys of the bankrupt as agent, representative or naked bailee. [65]

13.

That it appears from the record that the matters and things attempted to be adjudicated by the Referee are *res adjudicata*.

14.

That it appears from the proceedings and from the record that all matters and things over which the Referee attempts to exercise jurisdiction, have been determined in a plenary action in a court of competent jurisdiction.

And your petitioner further represents:

15.

That all moneys and property of every nature and kind whatsoever received by him from said bankrupt or of and from the proceeds of sale upon foreclosure of mortgages are declared by your petitioner to be his own, and the same are now and at all times have been held adversely to said bankrupt.

16.

That it appears from the record that a real adverse claim to the property sought to be reached exists in favor of the petitioner.

17.

That there is no evidence in the record to support the findings of the Referee and said findings do not support the conclusions of law reached by said Referee.

18.

That all the acts, proceedings, orders and findings,

so made by the Referee are void and of no effect, and same appears upon the face of the record.

And your petitioner further represents:

19.

That John P. Cull, the duly qualified and acting trustee herein did on November 30, 1918, file his certain action in the Superior Court of the State of Arizona, in and for Cochise County, a court of competent jurisdiction, against this petitioner, said cause being numbered 2818, a certified copy of the record whereof is hereto attached, marked Exhibit "A" and made a part of this petition by reference. [66]

That in said action next before referred to the said Trustee sought an accounting of the defendant in respect to all the matters and things sought to be determined by the Referee in these proceedings, and in which said action the petitioner joined issue by filing his demurrer and answer, and that the issues and matters and things in said action referred to were on May 17, 1919, adjudicated in favor of this petitioner and against said Trustee, and judgment therein in favor of your petitioner has become final.

20.

That John P. Cull the duly qualified and acting trustee herein did on the 8th day of Jan. 1919, file his certain action in the Superior Court of the State of Arizona, in and for Cochise County, a Court of competent jurisdiction, against this petitioner and against the sheriff of Cochise County, said cause being numbered 2961, a certified copy of the record whereof is hereto attached, marked

Exhibit "B" and made a part of this petition by reference.

That in said action next before referred to, the said trustee sought to restrain this petitioner and the sheriff of Cochise County from proceeding with the sale under judgment, rendered in mortgage foreclosure proceedings against the properties of the said bankrupt, and setting forth in his said complaint all the matters, things and issues sought to be determined by the Referee in these proceedings and praying for an accounting between the petitioner and said bankrupt in respect to the matter and things considered and attempted to be determined by the Referee in these proceedings, and in which said action this petitioner joined issue by filing his demurrer and answer, and that said restraining order was denied after due proceedings had thereon, vacated and dissolved and thereupon the said Trustee did on Nov. 18, 1919, move the Court to dismiss the said action, and said litigation was terminated in favor of this petitioner and judgment thereon has become final.

21.

That this petitioner excepts to all the acts and doings of the said Referee herein, in this regard, for the reasons hereinbefore [67] set forth.

22.

That your petitioner demands that these proceedings be referred to the United States District Court for the District of Arizona for review.

WHEREFORE your petitioner prays this Honorable Court that all proceedings of the Referee

herein be declared void and that your petitioner go hence without delay.

WILLIAM COWAN,
By DAVID BENSHIMOL,
Attorney for Petitioner.

[Endorsed on back:] Filed this 18th day of July, 1921, at 2 o'clock P. M. F. H. Bernard, Referee in Bankruptcy. [68]

Exhibit "A."

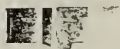
In the Superior Court in the State of Arizona, in
and for the County of Cochise.

2818.

JOHN P. CULL, Trustee in Bankruptcy of the Es-
tate of EARLE N. McKINNEY, a Bankrupt,
Plaintiff,

vs.

WILLIAM COWAN,



Defendant.

COMPLAINT.

The plaintiff complains of the defendant and alleges:

I.

That heretofore, to wit, on or about the 9th day of April, 1918, Earle N. McKinney filed in the District Court of the United States for the District of Arizona, his petition in voluntary bankruptcy, and by judgment of said District Court of the United States as aforesaid was on or about the 26th day of

April, 1918, adjudged a bankrupt and that thereafter and in due course of the administration of the estate of said bankrupt the plaintiff John P. Cull was by proper order and judgment of said United States Court appointed Trustee in Bankruptcy for the estate of the said Earl N. McKinney, bankrupt as aforesaid, and ever since has been and is now the duly appointed, qualified and acting Trustee in Bankruptcy for said estate and as such Trustee in Bankruptcy brings this action for the use and to the benefit of said bankrupt estate and the unsecured creditors thereof.

II.

That the defendant is a resident of the County of *Cochis*, State of Arizona, and that all the real and personal property involved in this litigation is situated in said county and state.

III.

That prior to and at the time the said Earl N. McKinney became a bankrupt as aforesaid he was the owner in fee simple of the following described real and personal property situate and being in Co-chise County, State of Arizona, to wit: The Northwest Quarter of Section 31 Township 23, South of Range 28 East of the Gila and Salt River Base and Meridian, together [69] with the improvements, equipment and fixtures thereon, all of which was and is of the value of fifteen thousand (\$15,000.00) dollars lawful money of the United States; also the South half of the Northwest Quarter and the West Half of the Northeast Quarter of Section 29, Township 23 South of Range 28 East of the Gile and

Salt River Base and Meridian, together with the improvements thereon, all of which said property is and was of the value of two thousand (\$2000.00) Dollars, lawful money of the United States; also Lots 1 and 2 and the South Half of the Northeast Quarter of Section 1, Township 24 South, of Range 27 East of the Gila and Salt River Base and Meridian, together with the improvements thereon, which said property was and is of the value of two thousand (\$2,000.00) dollars, lawful money of the United States; also the Southwest Quarter of Section 29 Township 23 South of Range 28 East of the Gila and Salt River Base and Meridian, together with the improvements thereon, which said property was and is of the value of two thousand (\$2,000.00) dollars, lawful money of the United States; also the West Half of the Southeast Quarter of the East Half of the Southwest Quarter of Section 30, Township 23 South of Range 28 East of Gila and Salt River Base and Meridian, which said property is and was of the value of one thousand five hundred (\$1,500.00) dollars lawful money of the United States; also a lease from the State of Arizona for a term of 5 years on Section 36, Township 22 South of Range 26 East of the Gila and Salt River Base and Meridian, together with the improvements thereon, which said property was and is of the value of five hundred (\$500.00) dollars lawful money of the United States; also household goods and furniture in the house upon the tract of land first above described which was and is of the value of two hundred and twenty-five (\$225.00) dollars

lawful money of the United States; also 100 head of dairy cows in the dairy upon the lands above described which said cows were and are of the value of one hundred and twenty-five (\$125.00) dollars each [70] and a total value of twelve thousand five hundred (\$12,500.00) dollars lawful money of the United States; also 150 head of young dairy cattle upon the lands above described which said cattle were and are of the value of seven thousand five hundred (\$7,500.00) dollars lawful money of the United States; also 10 horses and 2 mules used in connection with the dairy business upon the land above described, which were and are of the value of one thousand two hundred (\$1,200.00) dollars lawful money of the United States; also 3 wagons upon the land above described of the value one hundred and seventy-five (\$175.00) dollars lawful money of the United States; also one automobile truck used in connection with the dairy business on the above-described lands which said truck was and is of the value two hundred (\$200.00) dollars lawful money of the United States; one buggy on the lands above-described of the value of twenty-five (\$25.00) dollars; 2 sets of harness at the dairy and on the lands above-described of the value of forty-five (\$45.00) dollars lawful money of the United States; also plows, mowing machines, farming tools and implements on the above-described lands of the value of six hundred and seventy-five (\$675.00) dollars, lawful money of the United States; also 15 head of hogs at the dairy on the lands above-described, which said hogs were and are of the value of one hundred and

fifty (\$150.00) dollars, lawful money of the United States of America; also the Little Dairy Lunch business located on 10th Street between G and F Avenues, in the City of Douglas, Cochise County, Arizona, which said business was and is of the value of one thousand (\$1,000.00) dollars, lawful money of the United States; also 1 lot and house situate some place on 20th Street in the City of Douglas, Cochise County, State of Arizona; the exact discription of said lot and house is to plaintiff unknown, and that diligent inquiry on the part of plaintiff has failed to reveal [71] the same; that the discription of this property is known to the defendant to this action; that plaintiff is unable to get the proper discription of this property except upon discovery in this suit; that plaintiff is informed and believes and therefore alleges that this property was and is of the value of seven hundred and fifty (\$750.00) dollars, lawful money of the United States; that all of the property so owned by the said Earl N. McKinney as aforesaid and above-enumerated and set forth was and is of the value of forty-eight thousand four hundred and seventy-five (\$48,475.00) dollars, lawful money of the United States.

IV.

Plaintiff says that he is creditably informed and believes and therefore alleges that the defendant, William Cowan, claims mortgage liens on all or certain portions of the above-described property in the sum of and to the amount of twenty thousand four hundred and one dollars and sixty-eight cents (\$20,401.68); and plaintiff further says that he is cred-

itably informed and therefore alleges that various and sundry large sums of money have been paid by the said Earl N. McKinney to the said William Cowan on account of the aforesaid mortgage liens, and should be credited on same; that said amounts and credits do not appear on the records, and that plaintiff has made a diligent effort and can not ascertain the exact amounts and dates thereof but that said credits are approximately three thousand (\$3,000.00) dollars, lawful money of the United States; that the dairy cows and dairy cattle included within and covered by defendant, Cowan's mortgage lien as aforesaid has long since been sold by the said Earl N. McKinney, bankrupt, as aforesaid and replaced by other dairy cows and dairy cattle and that but 10 head of dairy cows remain and are included in the dairy cows and dairy cattle set forth in paragraph 3 of this complaint upon which the defendant William [72] Cowan has a mortgage, and that were included in the mortgage given to the said William Cowan by the said Earl N. McKinney that the plaintiff has made diligent effort and that he is unable to identify the dairy cows and dairy cattle which are included in said mortgage and those which are not included therein; that the Referee in Bankruptcy for the District Court of the United States for the District of Arizona and before whom these bankruptcy proceedings are pending had the defendant, William Cowan, regularly subpoenaed to appear before him and give testimony concerning the above things and matters, but that the said defendant, William Cowan, failed and refused to obey said sub-

poena; that this plaintiff is in need of the assistance of this court in the premises.

V.

Plaintiff further says that he is reliably informed and believes and therefore on such information and belief alleges that one of the aforesaid mortgages for which the defendant, William Cowan, claims a *lein* on the property of the said Earl N. McKinney for the sum and in the amount of three hundred (\$300.00) dollars is and was from its inception bogus and fraudulent, and that no consideration whatever was ever given by the defendant William Cowan to the said Earl N. McKinney bankrupt as aforesaid for the same or on account of the same; that said mortgage was knowingly and designedly made for the purpose of covering up the property of the said Earl N. McKinney and hindering, obstructing and delaying the creditors of the said Earl N. McKinney in collecting their debts.

VI.

That heretofore, to wit, on or about the 20th day of November, 1917, and before the institution of the proceedings in bankruptcy in the United States Court as aforesaid by the said Earl N. McKinney, the defendant William Cowan did knowingly, designedly, and intentionally, and with intent then and there to defraud the creditors of the said Earl N. McKinney enter into a fraudulent design and scheme with the said Earl N. McKinney, and did pursuant thereto have a verbal agreement and understanding with the said Earl N. McKinney that he the said defendant, William Cowan, take over all the property

set forth and described in paragraph 3 of this complaint, and of the then value of forty-eight [73] thousand four hundred and seventy-five (\$48,475.00) dollars, lawful money of the United States, and that the defendant William Cowan cover the same up from the other creditors of the said Earl N. McKinney, and that he the said William Cowan in furtherance of said scheme and design place a man in charge of said property to act jointly with the said Earl N. McKinney that said defendant, William Cowan, was to collect rents, issues and profits of said property, and the dairy business run in connection therewith and apply the same to the discharge of the mortgage *leins* he had against said property or portions thereof, and that after his debts were all paid he was to return all of said property to the said Earle N. McKinney; that on or about said date and pursuant to said agreement and understanding the said defendant William Cowan did place a man jointly in charge of said property and business with the said Earl N. McKinney, and thereafter he did tell and make known to the creditors of the said Earl N. McKinney that he was the owner of said property and business, and he did collect and take for his own use all rents, issues and profits of said property, and the proceeds of said dairy business; and in furtherance of said scheme and design to defraud the creditors of the said Earl N. McKinney the said defendant, William Cown, did thereafter institute in the Superior Court of Cochise County, State of Arizona, *and* action to foreclose said mortgage *leins* aforesaid including the one made and executed without consideration for the

sum of three hundred (\$300.00) dollars, and did knowingly, designedly, and fraudulently, and with intent to cheat and defraud the creditors of the said Earl N. McKinney procure the said Earl N. McKinney to make and enter a confession of judgment in said action for the sum and amount of twenty thousand four hundred and one dollars and sixty-eight cents (\$20,401.68) which said sum and amount did not allow [74] any creditors which had been paid thereon by the said Earl N. McKinney as hereinbefore alleged, which said fact was well known by the said defendant, William Cowan, at the time he procured and had said confession of judgment entered in said action; that thereafter and on or about the 1st day of April, 1918, the said defendant, William Cowan, in furtherance of said scheme and design to cheat and defraud the creditors of the said Earl N. McKinney, and with intent to cheat and defraud the same, did, wilfully, intentionally, designedly, and without authority of law, forcibly oust the said Earl N. McKinney from the control and possession of all of the real and personal property set up and described in paragraph 3 of this complaint, and did appropriate the same to his own use and benefit, said property being of the then value of forty-eight thousand four hundred and seventy-five (\$48,475.00) dollars, lawful money of the United States, and ever since said date has continued in the possession and to exercise control over said property and all thereof, and to use it as his own and to receive the rents, issues and profits of the same. That this plaintiff has no way of knowing what the rents, issues and

profits of said property has been since they have been so taken by the defendant, William Cowan; that all the books, papers, and records showing the same are in the possession of the defendant, William Cowan, who refuses to give this plaintiff access thereto.

VII.

That since the defendant, William Cowan, took over said property as aforesaid he has failed and neglected to properly care for and cause to be cared for the said dairy cows, and dairy cattle, and that the same have become poor and have greatly reduced in value; that he has removed some of the fences placed around the real property so taken over and has altered and changed the buildings and other improvements [75] on said real estate, and has greatly wasted the same; that the parties cannot be placed *in statu quo* by the return of said property.

WHEREFORE, the plaintiff prays that an accounting be had in this court between the plaintiff and defendant; that the amount due the said defendant, William Cowan, by Earl N. McKinney, a bankrupt, be determined by judgment of this Court; that the plaintiff have and recover judgment against the defendant, William Cowan, for the sum of forty-eight thousand four hundred and seventy-five (\$48,475.00) dollars, lawful money of the United States, less any amount that may be justly due the defendant, William Cowan, on account of claims against the said Earl N. McKinney, after a proper accounting in this court; that the title of said prop-

erty and all thereof be determined and disposed of by proper decree of this Court; that all matters between the parties be fully determined and disposed of by decree of this Court; that the plaintiff have and recover of and from the defendant his costs herein expended; and that the Court make all such further orders and decrees in the premises as may be just and *quitable* between the parties.

MANATT & STEPHENSON,
Attorneys for the Plaintiff.

[Indorsed on the back:] Filed Nov. 30, 1918.
J. E. James, Clerk Superior Court. By H. P.
Johnson, Deputy. [76]

In the Superior Court, in the County of Cochise,
State of Arizona.

2818.

Action brought in the Superior Court of the State
of Arizona, in and for the County of Cochise
and the Complaint filed in the said County of
Cochise, in the office of the Clerk of said Su-
perior Court.

JOHN P. CULL, Trustee in Bankruptcy of the Es-
tate of EARL N. McKINNEY, a Bankrupt,
Plaintiff,

vs.

WILLIAM COWAN,

Defendant.

THE STATE OF ARIZONA SENDS GREET-
ING: William Cowan.

You are hereby required to appear in an action brought against you by the above-named plaintiff in the Superior Court of the State of Arizona, in and for the County of Cochise, and to answer the complaint filed therein within twenty days (exclusive of the day of service) after the service on you of this summons (if served within the county otherwise within thirty days) or judgment by default will be taken against you according to the prayer of said complaint.

Given under my hand and the Seal of the Superior Court of the State of Arizona, in and for the County of Cochise, this 30th day of November, in the year of our Lord one thousand nine hundred and eighteen.

[Seal]

J. E. JAMES,

Clerk.

By H. P. Johnson,

Deputy Clerk.

(On back)

State of Arizona,
County of Cochise,
Office of Sheriff,—ss.

I, Guy C. Welch, Sheriff of Cochise County, State of Arizona, hereby certify that I received the within summons on the 30th day of November, 1918, and personally served the same upon —— of the defendant— named in said summons, by delivering to and leaving with [77] each of said defendants

hereinafter named, personally, at the time and place set out opposite the name of each of the said defendant—, within the County of Cochise, State of Arizona, a copy of said summons and a true and correct copy of the complaint in the action named in said summons attached to said copy of summons.

Name	Date served	Where served.
William Cowan	Dec. 3d, 1918	Ranch

Dated this 9th day of December, 1918.

GUY C. WELCH,
Sheriff.

By _____,
Deputy Sheriff.

[Endorsements]: No. 2818. Superior Court, County of Cochise, State of Arizona. John P. Cull, etc., Plaintiffs, vs. William Cowan, Defendant. Summons. Manatt & Stephenson, Plaintiff's Atty. Filed Dec. 11, 1918. J. E. James, Clerk of the Superior Court. By H. P. Johnson, Deputy. [78]

In the Superior Court of the State of Arizona, in
and for the County of Cochise.

JOHN P. CULL, Trustee in Bankruptcy of the Es-
tate of EARL N. McKINNEY, a Bankrupt,
Plaintiff,

vs.

WILLIAM COWAN,

Defendant.

DEMURRER AND ANSWER.

Comes now the defendant in the above-entitled cause and demurs to the complaint because the facts

therein stated do not constitute a cause of action against this defendant.

1. Because the plaintiff in this action while asking for an accounting does not offer to do equity, i. e., offer to pay to this defendant the amount of the indebtedness due to him.

2. Because the plaintiff while seeking equity does not offer to do equity, in that it is alleged that the bankrupt Earl N. McKinney had disposed of a large number of the cattle held by this defendant under his mortgages, meaning that this plaintiff may profit by the fraud of said McKinney.

3. Because this plaintiff stands in no better position regarding the mortgaged property described in the complaint than did said McKinney.

4. Because there is no allegation in the complaint that would indicate that under said mortgages referred to in the complaint, that this defendant had no right to the possession of the property referred to, but, on the contrary, the allegations of the complaint specifically state that the said McKinney gave possession to the defendant and that this defendant took possession of certain property, and there is no allegation that the mortgages upon all of the property described in the complaint were not made in good faith and for a valuable consideration.

5. Because there is no allegation in the complaint that the mortgages referred to were made by the said McKinney within four months of the time of his adjudication in bankruptcy.

6. Because under the allegations of the complaint certain property alleged to belong to the said McKinney is under mortgage to this defendant and this plaintiff can have no interest in said property [79] except to redeem the same from said mortgages or to recover from this defendant any surplus in said property above the amount due to this defendant under his said mortgages, to the same extent only that the said McKinney would have been entitled to, in the event that said mortgages are foreclosed and the security sold.

By His Attorneys:

DAVID BENSHIMOL.

J. T. KINGSBURY.

If the foregoing demurrer is overruled then this defendant answers the complaint as follows:

I.

Admits the allegations of *paragrpah* one and two of the complaint.

II.

Answering paragraph three of the complaint defendant:

a. Admits that Earl N. McKinney was the owner of the Northwest Quarter of Section 31, Twp. 23, S. R. 28, E. G. and S. R., B. and Meridian, and that there were improvements on said land, but denies that said land and improvements were worth the sum of Fifteen Thousand (\$15,000.00) Dollars and alleges that said land with all improvements, equipment and fixtures thereon is not and was not, at the times herein mentioned, worth more than

thirty-five hundred (\$3500.00) dollars to four thousand (\$4000.00) dollars.

b. Admits that said McKinney at the times herein mentioned was the owner of the South Half of the Northwest Quarter and the West Half of the Northeast Quarter of Section 29, Twp. 23, S. R. 28 E. G., and S. R. B. and Meridian, but denies that said property is and was of the value of Two Thousand (\$2000.00) Dollars as alleged, but believes and therefore says that said lands are not worth more than Five (\$5.00) Dollars per acre or Four Hundred (\$400.00) Dollars for the entire tract.

c. Denies that at the times herein mentioned said McKinney was the owner of Lots 1 and 2 of the South Half of the Northeast Quarter of Section 1, Twp. 24 S. R. 27 E. G. and S. R. B. and Meridian, denies that [80] said lands are worth the sum of Two Thousand (\$2000.00) Dollars.

d. Admits that at the times herein mentioned said McKinney was the owner of the Southwest Quarter of Section 29, Twp. 23, S. R. 28 E. G. and S. R. B. and Meridian, but denies that said lands were worth the sum of Two Thousand (\$2000.00) Dollars and believes and therefore says that the same are and were not worth at any of said times, more than Five (\$5.00) Dollars per acre or Eight Hundred (\$800.00) Dollars for all of said lands.

e. Admits that at the times herein mentioned the said McKinney was the owner of the West Half of the Southeast Quarter and the East Half of the Southwest Quarter of Section 30, Twp. 23 S. R.

28, E. G. and S. R. B. and Meridian, but denies that said lands were worth at any of said times the sum of Fifteen Hundred (\$1500.00) Dollars but believes and therefore says that said lands were not worth more than Five (\$5.00) Dollars per acre or Eight Hundred (\$800.00) Dollars for the one hundred and sixty (160) acres.

f. Is informed and believes and therefore says that said McKinney had at one time a lease on Section 36, Twp. 22, S. R. 26 E. G. and S. R. B. and Meridian with some improvements thereon, but denies that said lease or said improvements were of the value of Five Hundred (\$500.00) Dollars.

g. As to whether the said McKinney had any *household* goods or furniture in the house upon the tract of land described "a" above, or that the same were of the value of Two Hundred and Twenty-five (225.00) Dollars, this defendant is unable to state and therefore denies that there were any household goods and furniture in the house upon said lands and denies the alleged value thereof.

h. Admits that said McKinney had some dairy cows upon the lands described as being the Sections 29, 30 and 31 of Twp. 23, *Section* 28 E., but denies that between the dates of November 20th, 1917 and April 1st, 1918, that said McKinney had One Hundred (100) head of dairy cows upon the lands or in the dairy as set forth in Paragraph III of the complaint and denies that the dairy cattle upon said lands were of the value of One Hundred and Twenty-five (\$125.00) Dollars [81] each, but credibly informed and believes that the number of dairy

cows upon said lands was much less than One Hundred (100) head, to wit, not more than seventy (70) to eighty (80) head of dairy cows and that on an average the dairy cows upon said lands were not then and are not now of a value of more than *senvety*-five (\$75.00) Dollars per head.

l. Denies that said McKinney ever had young dairy cattle upon said lands, one hundred and fifty (150) head, or that the same were of the value of Seventy-five Hundred (\$7500.00) Dollars, but is informed and believes and therefore says that on and between the 20th of November, 1917, and April 1, 1918, there were on said lands about forty-five (45) to fifty (50) head of dry cows, yearlings and two year olds of the average value of not more than Twenty-five (\$25.00) Dollars each and forty-seven (47) head of calves of the value of not more than Ten (\$10.00) Dollars, each.

j. Denies that at the times herein mentioned said McKinney had upon said lands Ten (10) horses and Two (2) mules as alleged in Paragraph III of the complaint and denies that the value of said alleged horses and mules was Twelve Hundred (\$1200.00) Dollars, but is informed and believes and therefore says that there were but three (3) head of horses on said lands at the times herein mentioned and that the value of said three (3) head of horses was not more than Two Hundred (\$200.00) Dollars.

k. Denies that at the times herein mentioned said McKinney had upon said lands three (3) wagons and denies that said alleged wagons were

of the value of One Hundred and Seventy-five (\$175.00) Dollars, but is informed and believes and therefore says that there was and are now upon said lands some old broken down parts of wagons of no value except as junk.

l. Admits that the said McKinney had an automobile truck used in connection with the dairy business, but denies that the same was of the value of Two Hundred (\$200.00) Dollars and says that on and prior to the 20th day of November, 1917, said automobile truck was under attachment in a suit brought by the Douglas Lumber Company in the Justice Court of the Number Four Precinct of said County of Cochise, [82] in which action judgment was rendered against said McKinney on the 22d day of November, 1917, for the sum of One Hundred and One and 30/100 (\$101.30) Dollars; that said automobile was quite old and in bad repair and not worth as an old machine more than the amount of said judgment, but that the said McKinney offered to this defendant to release said automobile to him, if he the said defendant would take up said judgment; that in furtherance of said agreement said McKinney did deliver said automobile into the possession of this defendant and this defendant paid to the Douglas Lumber Company, the amount of said judgment, to wit: One Hundred and One and 30/100 (\$101.30) Dollars.

m. Admits that there is and was an old buggy on the lands above described, but denies that the same is of the value of Twenty-five (\$25.00) Dollars and says the same is in a very decrepit condition

and as old junk would not be worth Five (\$5.00) Dollars.

n. Admits that on or about the 20th day of November, 1917, that there were two (2) sets of harnesses on the premises, but says that the same were old and denies that they were of the value of Forty-five (\$45.00) Dollars and further says that the same as stated by said McKinney to this defendant were stolen while the same was under his control as manager of said dairy, that is some time subsequent to January 6, 1918.

o. Admits that there were some plows, mowing machines, filing tools and implements on the lands herein mentioned, but denies that the same were of the value of Six Hundred and Seventy-five (\$675.00) Dollars and says that the same were old, broken and in bad condition and are now upon said lands and are of no value except as junk and are not worth as junk more than Fifteen or Twenty Dollars.

p. Denies that said McKinney had upon said lands or owned and had upon said lands between the dates of November 20th, 1917, and January 8th, 1918, Fifteen (15) head of hogs or any hogs, but that subsequently from money received from other products of the dairy, between January 8, 1918, and April 1, 1918, the said McKinney purchased some young hogs and placed the same upon said lands, but the defendant is informed and believes and therefore says that between said [83] dates or prior to April 1, 1918, the said McKinney slaugh-

tered and ate or sold all of said hogs and that on April 1, 1918, there were no hogs on said lands.

q. Admits that prior to November 2, 1917, the said McKinney conducted a Dairy Lunch Business, on 10th Street between G and F Avenue, in the City of Douglas, and that on the premises where said business was conducted there was some furniture and fixtures; that on November 2, 1917, this defendant held a mortgage on said furniture and fixtures and on said date said McKinney sold out his Dairy Lunch Business to one Charles LePine; that said sale to said LePine was for the sum of Six Hundred and Nineteen and 35/100 (\$619.35) Dollars; that said McKinney owed to the Household Furniture Store, the sum of Ninety-seven and 55/100 (\$97.55) Dollars on said furniture; that said McKinney directed the said LePine to pay to this defendant in discharge of his said mortgage, the sum of Six Hundred and Nineteen and 35/100 (\$619.35) Dollars and directed this defendant to pay to said Household Furniture Store, the sum of Ninety-seven and 55/100 (\$97.55) Dollars for same, and directed this defendant to credit the balance, to wit, the sum of Five Hundred and Twenty-one and 80/100 (\$521.80) Dollars upon his interest indebtedness to defendant and also directed the defendant to discharge the mortgage aforesaid, which the defendant held upon said fixtures and which was given by said McKinney to secure his interest indebtedness.

r. Denies that the defendant McKinney owned a lot and house as attempted to be alleged in said paragraph III of the complaint, but says that on

December 26, 1916, the said McKinney made a contract with one M. J. Donohoe for the purchase of lot nine (9) in Block Eleven (11) of the North Douglas Addition to the City of Douglas for the sum of Two Hundred and Twenty-five (\$225.00) Dollars, paying Ten (\$10.00) Dollars down and agreeing to pay Twenty-five (\$25.00) Dollars per month thereon and also agreed to forfeit his rights, if any payment was ninety (90) days in default; that some time between said December 26, 1916 and the 13th day of November, 1917, the said McKinney removed a small house from the premises described in "a" above without the consent [84] of this defendant and placed the same on said lot; that said McKinney never paid any further payment on said lot and the same became in default and the said Donohoe claimed possession of said property and on said November 13, 1917, in consideration of One (\$1.00) Dollars the said McKinney by an instrument in writing assigned said contract to this defendant, whereupon this defendant, in order to protect the value of said house upon said lot, which had been upon property mortgaged by the said McKinney to this defendant, paid to said M. J. Donohoe the sum of Two Hundred and Twenty-five (\$225.00) Dollars and obtained a deed of the same and the said property is now of record in this defendant.

Further answering, the defendant denies that all of the property alleged to be owned by said McKinney as set forth in Paragraph III of the complaint was and is of the value of Forty-eight Thousand

Four Hundred and Seventy-five (\$48,475.00) Dollars.

III.

Answering Paragrpah IV of the complaint, the defendant says that he is the owner and holder of the following described mortgages upon property at some time owned by the said McKinney.

a. Mortgage for Twenty-five Hundred (\$2500.00) Dollars on the South half of the Northwest Quarter, West half of the Northeast Quarter and all of the Southwest Quarter of Section 29 Twp. 23 S. R. 28 E. G. and S. R. B. and Meridian, also all improvements on Section 36, Twp. 22 S. R. 26 E. G. and S. R. B. and Meridian in the County of Cochise, State of Arizona, and that said mortgages with accumulated interest and taxes for several years paid by this defendant is overdue and unpaid.

b. Mortgage on the Northwest Quarter and the Northeast Quarter of the Northwest Quarter and the Southeast Quarter of the Northwest Quarter of Section 31 Twp. 23 S. R. 28 E. G. and S. R. B. and Meridian and a chattel mortgage on all dairy utensils and implements of every description including wagons and harnesses; Sixteen (16) head of horses of various brands; one (1) mule; all cattle branded E. R. L. on left side, ranging in and about Sulphur Springs Valley, Cochise County, Arizona, the utensils and implements, horses and mule on ranch of McKinney, Northeast of Douglas which said chattel mortgage is filed and abstracted in Book Five (5) of Chattel Mortgages of Cochise County, at page two hundred and [85] twenty-four (224);



that said mortgages were given to secure the sum of Thirty-five Hundred (\$3500.00) Dollars on January 8, 1915; that said mortgages, accumulated interest and taxes on said property paid by this defendant are overdue and unpaid.



c. Mortgage for Two Thousand (\$2,000.00) Dollars on the Southeast quarter of Section 24, Twp. 23 S. R. 27 E. G. and S. R. B. and Meridian and the East half of the Southwest quarter and the West half of the Southeast quarter of Section 30 Twp. 23 S. R. 28 E. G. and S. R. B. and Meridian, all in said Cochise County, Arizona; that said mortgage together with accumulated interest and taxes for several years paid by this defendant is overdue and unpaid.

d. Mortgage on all cattle and their increase, cattle branded E. R. L. on left side, ranging in the Sulphur Springs Valley, Arizona. Amount of mortgage is Forty-six Hundred (\$4600.00) Dollars, with interest at Ten (10) per cent per annum, mortgage filed and abstracted in Book Five (5) of Chattel Mortgages of Cochise County, Arizona, page one hundred and seven (107), January 21, 1914, date of mortgage January 15, 1914, that said mortgage together with accumulated interest and taxes for several years paid by this defendant is overdue and unpaid.

e. Mortgage on thirty (30) head of milch cows, fourteen (14) head of horses two (2) De Laval Separators, two (2) delivery wagons, two (2) feed wagons, all dairy utensils of every description and kind, all of the above on ranch north of

Douglas, amount of mortgage Two Thousand (\$2,000.00) Dollars, and interest at ten (10) per cent per annum, mortgage filed and abstracted in Book Five (5) of Chattel Mortgages of Cochise County, Arizona, page one hundred and sixteen (116), February 21, 1914. Date of mortgage, February 18, 1914; that said mortgage together with accumulated interest and taxes for several years paid by this defendant is over due and unpaid.

f. Mortgage on thirty-five cows branded  and  on left side, twenty-six (26)

calves branded  and  on left side, all on ranch northeast of Douglas, amount of mortgage Sixteen Hundred and sixty (\$1,660.00) Dollars, and interest at ten (10) per cent per annum, mortgage filed and abstracted in Book Five (5) of Chattel [86] Mortgages of Cochise County, Arizona, at page two hundred and five (205), November 7, 1914. Date of mortgage October 22, 1914; that said mortgage together with accumulated interest and taxes for several years paid by this defendant is overdue and unpaid.

g. Mortgage on Ford Automobile Three Hundred (\$300.00) Dollars, dated May 10, 1917, abstracted and filed in Book Six (6) of Chattel Mortgages of said Cochise County, on June 11, 1917, which mortgage was given as security for overdue interest on other mortgages and is on the automobile truck described in Section "1" of paragraph II of this answer.

h. That all just credits have been given on said mortgages and there is no credit against said mortgages that has not been applied; that all of the obligations for which said mortgages were given, bear interest at the rate of ten (10) per cent per annum, interest payable monthly; the said interest if not so paid, to be added to and to become a part of the principal, and bear the same rate of interest; that all of said mortgages except said mortgage for Three Hundred (\$300.00) Dollars provided for the payment of attorney's fees, in some cases ten (10) per cent and in others a reasonable attorney's fee.

i. Denies, as alleged in paragraph IV, that the dairy cows and the dairy cattle included within and covered by defendant's mortgages or mortgage liens have long since been sold and replaced by other dairy cows and dairy cattle and denies that but ten (10) head of dairy cows remain and are included in the dairy cows and dairy cattle set forth in the complaint, as those upon which the defendant holds mortgages.

IV.

Denies each and every allegation in paragraph V of the complaint, contained.

V.

Answering paragraph VI of the complaint, the defendant says that on or about November 3, 1917, the said Earl McKinney having disposed of his Dairy Lunch Business to said Charles LePine, informed this [87] defendant that he was without funds to provide for feed for the dairy cattle then held by him on the lands herein described, that

he had insufficient and hardly any feed to carry the cattle through the winter, that he had no credit and requested the defendant to furnish the feed and provide the funds to pay for and maintain the upkeep of said cattle; that this defendant thereupon went upon the lands herein described, inventoried the cattle thereon and discovered that all of the property provided in his said mortgages of chattels was not in the possession of the said McKinney and not deeming himself secure, took possession of said property and thereafter provided the feed and the funds for the maintenance and upkeep of the dairy conducted on said lands, the said McKinney remaining upon said lands and looking after and caring for said cattle; that on or about the middle of December, 1917, this defendant upon the admission of the said McKinney that he was unable to pay off said mortgages, directed his attorney, David Benshimol, to proceed with the foreclosure of all of his said mortgages given to him by said McKinney; that said suit to foreclose all of said mortgages was filed in the Superior Court for the County of Cochise, State of Arizona, on the 31st day of December, 1917, and a copy of the complaint was delivered to said McKinney; that thereafter the said McKinney signed a confession of Judgment for the sum of Sixteen Thousand Two Hundred and Sixty (\$16,260.00) Dollars principal, interest accrued to January 3, 1918, and attorney's fees, amounting to about Nineteen Hundred (\$1,900) Dollars; that said confession of judgment was duly filed in said Superior Court, on January

4, 1918; that immediately thereafter, the said McKinney telegraphed to the Judge of said Superior Court relative to signing of said confession of judgment, asking the Judge of said court not to enter said confession of judgment until he had seen this defendant; that thereafter, to wit: on January 7, 1918, this defendant and the said McKinney met at the office of David Benshimol in said Douglas, went over their accounts and had an accounting together and thereupon this said McKinney and this said defendant entered into an agreement for judgment upon the basis of said accounting wherein [88] they agreed that the amount for which judgment was to be entered against the said McKinney should be on the principal of said mortgages, Sixteen Thousand Two Hundred and Sixty (\$16,260.00) Dollars, and Three Thousand Six Hundred and Forty-one and 68/100 (\$3,641.68) Dollars interest, computed to January 3, 1918, and in said agreement for judgment, the amount of attorney's fees was set for the foreclosure of all of said mortgages at the sum of Five Hundred (\$500.00) Dollars and said agreement for judgment also included costs; that said agreement for judgment was duly filed in said Superior Court, on January 8, 1918.

That at said meeting for an accounting wherein said agreement for judgment was made, the said McKinney asked and requested this defendant to delay the foreclosure and sale of the property and chattels covered by said mortgages, for two or three months, to give him, the said McKinney, an opportunity to find someone who would take up the mort-

gages from this defendant and asked and requested this defendant to employ him as manager of the dairy and the cattle, which were then in this defendant's possession, until such time, within such period, as he could find someone to take up said mortgages, whereupon this defendant agreed to employ said McKinney at a salary of One Hundred and Fifty (\$150.00) Dollars per month to take charge of said dairy and care for the cattle; that from November 20, 1917, this defendant has furnished the feed and provided the care for all of the cattle on said lands and has paid the bills for the maintenance and upkeep of said dairy and has sold the products therefrom, but the proceeds from said dairy have been insufficient to pay the cost and upkeep of said cattle and said dairy; that after said accounting and said agreement said McKinney remained in the employ of this defendant until about April 1, 1918; that three weeks prior to said April 1, 1918, said McKinney left said dairy and its care and was absent for about one week, allowing the cattle and the dairy to become in a disordered condition and took and converted to his own use certain sums of money, belonging to this defendant, that he had collected from the sale of products of the dairy, well knowing that it had been [89] his agreement and custom to turn in to this defendant all collections from the sale of said products each day or at the most each second day and that he was not to make any expenditure or take any of said funds without the permission of this defendant or his attorney.

Further answering said paragraph VI, this defendant says that at no time, under the care and management of said McKinney, while in the employ of the defendant, were sales of dairy products sufficient to pay for the feed and upkeep of said stock and said dairy; that all of said milk was being sold in the City of Douglas and much of it sold direct or indirectly and consumed in the military camp outside of said City of Douglas; that said McKinney had been warned many times by health authorities of the City of Douglas and the military health authorities the milk he was delivering was not up *the* the standard and that the dairy was not being kept in a sanitary condition and the said McKinney was informed that the sale by him of milk would be forbidden if the dairy was not cleaned up, this, said McKinney refused and neglected to do although, requested by this defendant to conform to the requirements of the health authorities, several times, and the defendant to prevent further loss, on or about said April 1st, told said McKinney that he could not run said dairy any longer and immediately thereafter placed another person in charge of the dairy, but the health authorities aforesaid immediately thereafter forbade the sale of milk from said dairy until the filth and manure that had accumulated for many months upon the dairy premises, had been removed and certain sanitary changes made in the barns, tanks, machinery and milk houses on the dairy premises, and this defendant, in order that there might not be a greater loss from the suspension of said dairy expended

approximately Two Thousand (\$2,000.00) Dollars in cleaning up and remodeling said dairy premises; that for more than three weeks while these operations were going on the milch cattle and other cattle on said lands had to be fed and the milch cattle milked, which milk was disposed of at a great loss; that on or about May 5, 1918, the said health authorities permitted the sale of milk from said dairy to be resumed; [90] that subsequently, a tuberculin test was applied to said dairy cattle by the United States authorities and fourteen (14) head of milch cattle were found infected, and were ordered removed from said herd and destroyed.

Further answering said paragraph VI, the defendant says that said McKinney when directed on or about said April 1, to quit handling said dairy, agreed to do so and did do so without dissent and at the same time requested of this defendant that he advance him the sum of One Hundred (\$100.00) Dollars to make a start in some other business saying to this defendant that he was sick and tired of the dairy business and was glad it was off his hands; that said sum of One Hundred (\$100.00) Dollars was paid to said McKinney by this defendant on April 7, 1918.

Further answering said paragraph Vi this defendant denies that he entered into any fraudulent design and scheme with said McKinney as alleged in said paragraph or made with said McKinney the said agreement or any agreement other than that which is herein set forth and denies that said foreclosure proceedings were instituted in fraud

of the creditors of said McKinney and denies that said mortgage of Three Hundred (\$300.00) Dollars was fraudulent and denies that for the purpose of cheating and defrauding the creditors of said McKinney that he procured said McKinney to make and enter a confession of judgment, denies that the amount of said confession of judgment did not allow any credits which had been paid thereon by the said McKinney, but alleges that all credits had been allowed and duly credited and that the said McKinney well knew the same; denies that in furtherance of a scheme and design to cheat and defraud the creditors of said McKinney, that he did unlawfully, intentiontionally, designedly and without authority of law, forcibly oust or did oust the said McKinney from the control and possession of the property as alleged, but that said McKinney acceded to his discharge from the employment of the defendant as herein recited. [91]

VI.

Denies that said dairy cows and cattle have not been properly cared for and that the same have been neglected as alleged in paragraph VII of the complaint, or that the same have become poor and are greatly reduced in value or that he has wasted any of the improvements on the real estate, but says that the said dairy cattle and dairy cows have been carefully cared for, the health of the same improved, the diseased cattle removed and that the entire plant is in much better condition and improved than under the management of said McKinney and that the cost of the maintenance of said

plant has been materially decreased so that within the past few months the products from said dairy very nearly equal the expense of the maintenance of said dairy, and the feeding of said dairy cows and cattle; furthermore the defendant says that there has been a natural increase of said cattle from said cows during the past six or seven months.

VII.

Denies each and every other allegation, items or inference contained in the complaint and the several paragraphs thereof, not herein specifically admitted or denied.

VIII.

Further answering the complaint the defendant says that this plaintiff was appointed trustee of the bankrupt estate of said Earl N. McKinney on about the first day of May, 1918, and immediately thereafter this defendant requested this plaintiff to make an appraisal of all of the chattels in his possession, and in order that if there was, in the judgment of this plaintiff, any equity in said chattels and lands held under the mortgages given by said McKinney to the defendant, said trustee, for the benefit of said McKinney's creditors might redeem said chattels and said lands from said mortgages, the foreclosure proceedings which had been previously instituted being by this defendant still held in abeyance. But this plaintiff although often requested took no action and permitted said cattle and other chattels and lands to remain unappraised and any [92] equity, if there were any such, to be and remain undetermined. That so

far as this defendant is able to ascertain, no attempt has ever been made by this plaintiff or the duly appointed appraisers in said bankrupt estate to appraise the chattels and lands herein mentioned.

Further answering this defendant is informed and believes and therefore says that this plaintiff is guilty of *laches* in not endeavoring to ascertain the value of the lands and the value quantity and condition of the chattels that were in this defendant's possession and that the said plaintiff does not bring this action in good faith.

IX.

Further answering the complaint the defendant says that he is a dairyman and has no desire to carry on a dairy business and that he is and has always been ready and willing to discharge his said mortgages and deliver over the possession of all of the lands and chattels covered by the same when, and if he is paid the amount due and owing to him under the same and all legal charges and expenses incurred by him, and all expenses that he may be legally entitled to, provided that said payment be made without further delay and cost to him and that when this plaintiff shall offer to pay him the amounts of his claims against said property, and costs justly incurred in connection with the same he is ready and willing to make an account of all receipts and expenditures from the operation of said dairy on the lands described herein.

X.

That this defendant believes that this action is not brought in good faith and that as a result of it

he has been obliged to employ attorneys at great expense to defend the same.

WHEREFORE, the defendant prays:

1. That the Court investigate the merits of this action.

2. That the Court ascertain whether or not an accounting has been had between said McKinney and this defendant.

3. That the Court determine whether said accounting between [93] this defendant and said McKinney, if it find that there has been one made, was just and equitable and whether any fraud was perpetrated therein on said McKinney.

4. That if an accounting is found to have been had with said McKinney on or about January 7, 1918, that no accounting be directed herein.

5. That this Court make its order that this plaintiff pay to this defendant the amount of all and every amount due to this defendant under his said mortgages that is due and owing thereon and all costs and expenses and interest accrued thereon and all expense legally incurred in connection with the property and that the same be tendered or paid into Court forthwith, together with the expenses of the foreclosure proceedings referred to in this answer, before he shall be entitled to redeem said real and personal property from this defendant.

6. For his costs, expenses and attorney's fees in this action.

7. For such other and further relief as may be proper and meet in the premises.

By His Attorneys,
DAVID BENSHIMOL.
J. T. KINGSBURY.

State of Arizona,
County of Cochise,—ss.

I, David Benshimol, being duly sworn, on oath depose and say, that I am one of the attorneys for the defendant, that I have read the foregoing demurrer and answer and know the contents thereof, that I am familiar with the most of the facts alleged therein and state that the same are true as of my own knowledge, that as to those facts alleged upon belief or information and belief, I believe such to be true.

DAVID BENSHIMOL.

Subscribed and sworn to before me this 19th day of December, 1918.

[Seal]

H. W. WILLIAMS,
Notary Public.

My commission expires Feby. 19, 1920. [94]

[Indorsed on the back:]

Rec'd copy Dec. 21, 1918.

MANATT & STEPHENSON.

Filed Dec. 21, 1918. J. E. James, Clerk Superior Court. By H. P. Johnson, Deputy. [95]

In the Superior Court of Cochise County, State
of Arizona.

No. 2818.

JOHN P. CULL, Trustee,

Plaintiff,

vs.

WILLIAM COWAN,

Defendant.

NOTICE OF MOTION.

To William Cowan, Defendant, or His Attorneys
of Record, J. T. Kingsbury and David Ben-
shimol:

You will take notice that the plaintiff has filed
his motion to set aside and vacate the order and
ruling of the Court made and entered in the above
case on the 17th day of May, A. D. 1919, sustaining
defendant's demurrer to plaintiff's complaint, a
true copy of said motion is attached hereto and
made a part hereof.

That the plaintiff will ask to be heard on said
motion on the 7th day of June, 1919, at the hour
of 1:30 o'clock P. M. of said date or as soon there-
after as he can be heard, in the courtroom at the
City of Tombstone, Arizona, all at the courthouse
of said county and State.

MANNATT & STEPHENSON,

Attorneys for Plaintiff.

Copy mailed to J. T. Kingsbury, Attorney, this
22d day of May, 1919. [96]

In the Superior Court of Cochise County, State
of Arizona.

No. 2818.

JOHN P. CULL, Trustee,

Plaintiff,

vs.

WILLIAM COWAN,

Defendant.

MOTION TO SET ASIDE ORDER.

Comes now the above plaintiff and moves the Court to set aside and vacate the order and ruling of the Court made and entered in the above cause on the 17th day of May, A. D. 1919, in which order the Court sustained the demurrer of the defendant, to the plaintiff's complaint, and which order and ruling of the Court, the plaintiff *claims* is erroneous, unjust and inequitable in the premises for the following reasons:

I.

That for the reason that said matter has never been argued or set down for argument, and no notice was at any time served or given the plaintiff or his attorneys, that the same would be argued or heard on the 17th day of May, 1919, or at any other time, and the plaintiff nor his attorneys was present at said date or any other date when the same was taken up or considered by the Court, or heard by the Court and therefore the plaintiff has at no time had his day in Court on the matters involved.

II.

That the plaintiff and his attorneys reside and have their places of business in Douglas, Arizona, and some 50 miles from the county seat of Cochise County, State of Arizona, and it is impossible for litigants and their attorneys to be in continuous attendance at the place of holding Court, *whn* so located, and residing away from the county seat, and it is the practice and rule to notify litigants and their attorneys when any matters they are interested in are heard or set down for hearing, and in the matter herein involved neither the plaintiff nor his attorneys was at any time notified, of the hearing on the demurrer, or the argument thereon, and have had no *oppertunity* to present their side of the controversey and have been at all times ready and willing [97] to appear in Court at such time as the Court would set the same down for argument or hearing.

III.

That the plaintiff desires to be heard on the matter involved and raised by defendants' demurrer, and at the time *if* the ruling of the Court is adverse to the interests of the plaintiff, the plaintiff desires the *oppertunity* to make such record, and take such steps as will best protect the interests the plaintiff represents, all of which rights and interests, as the matter was disposed of in the absence of plaintiff and his attorneys is unfair and inequitable to plaintiff.

IV.

That the ruling of the Court and the order based

thereon is erroneous and not sustained by the law in the case, as plaintiff contends that his complaint states a cause of action in favor of plaintiff and against defendant.

That this motion will be sustained by oral and written evidence on the hearing thereof.

MANATT and STEPHENSON,
Attorneys for Plaintiff.

[Indorsed on the back:]

Copy mailed to J. T. Kingsbury, Attorney, May 22d, 1919.

MANATT & STEPHENSON,
Attorneys for Plaintiff.

Filed May 23, 1919. J. E. James, Clerk Superior Court. By H. P. Johnson, Deputy. [98]

In the Superior Court of the State of Arizona, in
and for the County of Cochise.

2818.

JOHN P. CULL,

Trustee,

vs.

WILLIAM COWAN,

Deft.

COST BILL.

To Clerk filing Answer\$5.00

State of Arizona,
Cochise County,—ss.

J. T. Kingsbury, having been sworn, says that the above statement of costs in said cause is true

and correct, and that he is the attorney for defendant.

J. T. KINGSBURY.

Subscribed and sworn to before me this 10th day of Nov. 1919.

[Seal]

J. E. JAMES,

Clerk.

By H. P. Johnson,

Deputy.

[Indorsed on the back:] Filed Nov. 10, 1919.
J. E. James, Clerk Superior Court. By C. S. Bachelder, Deputy.

In the Superior Court of the State of Arizona, in
and for the County of Cochise.

Court convened pursuant to recess at 10:00 o'clock
A. M. Present: Hon. Alfred C. Lockwood,
Judge; R. N. French, County Attorney; J. F.
McDonald, Sheriff; J. M. Phillipowski, Re-
porter; J. E. James, Clerk.

Court was duly opened by the officers, according
to law. [99]

2818.

JOHN P. CULL, etc.,

vs.

WILLIAM COWAN.

CERTIFIED COPY OF MINUTES.

Minute Entry January 18, 1919, Book 27, Page 493.

It is by the Court ordered that the hearing on

law points herein be and the same is hereby continued to January 25, 1919.

Minute Entry February 15, 1919, Book 27, Page 586.

It is by the Court ordered that the hearing on law points herein be and the same is hereby set for March 1, 1919.

Minute Entry March 1, 1919, Book 28, Page 58.

It is by the Court ordered that the hearing on law points herein be and the same is hereby continued to March 8, 1919.

Minute Entry March 13, 1919, Book 28, Page 93.

It is by the Court ordered that the hearing on law points herein be and the same is hereby continued to March 15, 1919.

Minute Entry March 15, 1919, Book 28, Page 99.

It is by the Court ordered that the hearing on law points herein be and the same is hereby continued to March 29, 1919.

Minute Entry March 29, 1919, Book 28, Page 153.

It is by *the ordered* that the hearing on law points herein be and the same is hereby continued to April 5, 1919.

Minute Entry April 5, 1919, Book 28, Page 174.

It is by the Court ordered that the hearing on law points herein be and the same is hereby continued to April 12, 1919.

Minute Entry April 12, 1919, Book 28, Page 195.

This cause came on this date for hearing on the demurrer of the defendant to the Complaint herein, the Court heard counsel on the matter and took the same under advisement.

Minute Entry May 17, 1919, Book 28, Page 300.

It is by the Court ordered that the demurrer herein be and the same is hereby sustained.

Minute Entry November 8, 1919, Book 29, Page 79.

On motion of the Plaintiff, it is by the Court ordered that [100] this action be and the same is hereby dismissed without prejudice, upon the payment of costs by the plaintiff.

ALFRED C. LOCKWOOD,

Judge of the Superior Court.

(On cover:)

State of Arizona,
County of Cochise,—ss.

I, J. E. James, Clerk of the Superior Court of the State of Arizona, in and for the County of Cochise, hereby certify the annexed and foregoing to be a full, true and correct copy of Entire Record and Minute Entries in case No. 2818, John P. Cull, etc., Plaintiff, vs. William Cowan, Defendant, the originals thereof now remaining on file in the office of said Clerk in the city of Tombstone, said state and county aforesaid.

WITNESS my hand and the Seal of the said Superior Court this 8th day of July, 1921.

[Seal]

J. E. JAMES,

Clerk of the Superior Court.

By H. P. Johnson,

Deputy.

[Endorsed on back:] Filed this 18th day of July, 1921, at 2 o'clock P. M. F. H. Bernard, Referee in Bankruptcy. [101]

Exhibit "B."

In the Superior Court in the State of Arizona, in
and for the County of Cochise.

JOHN P. CULL, Trustee in Bankruptcy of the Es-
tate of EARLE N. McKINNEY, a Bankrupt,
Plaintiff,

vs.

WILLIAM COWAN, EARL N. McKINNEY, and
JAMES McDONALD, Sheriff of Cochise
County, in the State of Arizona,
Defendants.

COMPLAINT.

The plaintiff complains of the defendants and al-
leges:

I.

That heretofore, to wit, on or about the 9th day of
April, 1918, Earl N. McKinney filed in the District
Court of the United States for the District of Ari-
zona his petition in voluntary bankruptcy, and by
judgment of the District Court of the United States
aforesaid was on or about the 26th day of April,
1918, adjudged a bankrupt, and that thereafter and
in the due course of administration of the estate
of said bankrupt the plaintiff John P. Cull was by
proper order and judgment of said United States
appointed Trustee in Bankruptcy for the estate of
the said Earl N. McKinney, bankrupt as aforesaid,
and ever since has been and is now the duly ap-
pointed, qualified and acting Trustee in Bankruptcy

for said estate, and as such Trustee in Bankruptcy brings this suit for the use and to the benefit of said bankrupt estate, and the unsecured creditors thereof.

II.

That the defendant William Cowan is a resident of the County of Cochise, State of Arizona; that the defendant Earl N. McKinney at the time of becoming a bankrupt as aforesaid was a resident of the County of Cochise, State of Arizona, but is now a resident of the City of Fresno in the State of California; that the defendant James McDonald is duly elected, qualified and acting Sheriff of Cochise County, State of Arizona; that all the property both real and personal involved in this suit is situate in the County of Cochise, State of Arizona. [102]

III.

That prior to and at the time the said Earl N. McKinney became a bankrupt as aforesaid he was the owner in fee simple of the following described real and personal property situate and being in Cochise County, State of Arizona, to wit: The Northwest Quarter of Section 31, Township 23 South of Range 28 East of the Gila and Salt River Base and Meridian, together with the improvements thereon, all of which was and is of the value of fifteen thousand (\$15,000.00) dollars, lawful money of the United States; also the South Half of the Northwest Quarter and the West Half of the Northeast Quarter of Section 29, Township 23 South of Range 28 East of the Gila and Salt River Base and Meridian, together with the improvements thereon all of which said property was and is of the value of two thou-

sand (\$2,000.00) dollars, lawful money of the United States; also Lots 1 and 2 and the South Half of the Northeast Quarter of Section 1, Township 24 South of Range 27 East of the Gila and Salt River Base and Meridian, together with the improvements thereon, which said property was and is of the value of two thousand (\$2,000.00) dollars, lawful money of the United States; also the Southwest Quarter of Section 29, Township 23 South of Range 28 East of the Gila and Salt River Base and Meridian, together with the improvements thereon, which said property was and is of the value of two thousand (\$2,000.00) dollars, lawful money of the United States; also the West Half of the Southeast Quarter and the East Half of the Southwest Quarter of Section 30, Township 23, South of Range 28 East of the Gila & Salt River Base & Meridian, which said property was and is of the value of One Thousand Five Hundred Dollars, lawful money of the United States; also a lease from the State of Arizona for a term of five years on Section 36, Township 22, South of Range 26 east of the Gila & Salt River Base & Meridian, together with the improvements thereon, which said property was and is of the value of Five Hundred Dollars, lawful money of the United States; also household goods and furniture in the house upon the tract of land first above described which was and is of the value of [103] Two hundred Twenty-five Dollars (\$225.00), lawful money of the United States; also one hundred (100) of dairy cows in the dairy upon the lands above-described, which said cows were and are of the value of One

Hundred Twenty-five Dollars (\$125.00) each and a total value of Twelve Thousand Five Hundred (\$12,500.00), lawful money of the United States also One Hundred Fifty head (150) young dairy cattle upon the lands above described, which said cattle were and are of the value of Seven Thousand Five Hundred Dollars (\$7,500.00), lawful money of the United States; also ten (10) horses and two (2) mules used in connection with the dairy business upon the land above described, which said horses and **mules were and are of the value of One Thousand Two Hundred Dollars (\$1,200.00)**, lawful money of the United States; also three (3) wagons upon the **lands above described and used in connection** therewith, which said wagons were and are of the value of One Hundred Seventy-five Dollars (\$175.00), lawful money of the United States; also one automobile truck used in connection with the dairy business in and upon the lands above described, which said truck was and is of the value of Two Hundred Dollars (\$200.00), lawful money of the United States; also one buggy on the lands above described and used in connection with the dairy business conducted thereon, which said buggy was and is of the value of Twenty-five Dollars (\$25.00), lawful money of the United States; also two (2) sets of harness used in connection with the dairy business upon the lands above described, which said harness were and are of the value of Forty-five Dollars (\$45.00), lawful money of the United States; also plows, mowing machine, farming tools and implements used on and in con-

nection with the above-described lands, which were and are of the value of Six Hundred Seventy-five Dollars (\$675.00), lawful money of the United States; also fifteen (15) head of hogs at the dairy on the lands above described, which said hogs were and are of the value of One Hundred Fifty Dollars (\$150.00), lawful money of the United States; also what is known as Little Dairy Lunch Business, located on 10th Street between "G" and "F" Avenues, in the city of Douglas, County of Cochise, [104] State of Washington, together with all the stocks and equipments used in connection with said business, all of which was and is of the value of One Thousand Dollars, (\$1,000.00), lawful money of the United States; also lot 9 in Block 11 of the North Addition to the City of Douglas, Cochise County, Arizona, together with the house and improvements thereon, which said property was and is of the value of Seven Hundred Fifty Dollars (\$750.00), lawful money of the United States; that all the property so owned by the said Earl N. McKinney as aforesaid and above enumerated and set forth was and is of the aggregate value of Forty-eight Thousand Four Hundred Seventy-five Dollars (\$48,475.00), lawful money of the United States.

IV.

That heretofore, to wit, on or about the year 1916, and before the defendant Earl N. McKinney became a bankrupt as aforesaid, the said Earl N. McKinney made, executed and delivered to the defendant, William Cowan, a real estate mortgage for the sum of Two Thousand Five Hundred Dollars (\$2500.00),

lawful money of the United States, on the south half of the northwest quarter, and the west half of the northeast quarter, and all of the southwest quarter of Section 29, Township 23 South of Range 28 East of Gila & Salt River Base & Meridian, and also all the improvements on Section 36, Township 22 South of Range 26 East of Gila & Salt River Base & Meridian. And the said defendant Earl N. McKinney did also heretofore, to wit, on or about the month of January, 1915, make, execute and deliver to the defendant William Cowan a mortgage for the sum of Three Thousand Five Hundred Dollars (\$3,500.00), lawful money of the United States, on the northwest quarter and the northeast quarter of the northwest quarter, and the southeast quarter of the northwest quarter of section 31, township 23, South of Range 28 east of the Gila & Salt River Base & Meridian, and all of the dairy utensils and implements of every description, including wagons and harness; also sixteen (16) head of horses and one (1) mule and all the cattle branded E. R. L. on left side ranging in and about Sulphur Springs Valley, Cochise County, Arizona. And the defendant Earl N. McKinney did heretofore and on or about the year 1915 make, execute and deliver to the defendant, William [105] Cowan, a mortgage for the sum of Two Thousand Dollars (\$2,000.00), lawful money of the United States, on the southwest quarter of Section 24, Township 23 South of Range 27 East of the Gila & Salt River Base & Meridian, and the east half of the southwest quarter, and the west half of the southeast quarter of Section 30, Township 23,

south of range 28 East of the Gila & Salt River Base & Meridian; that the defendant Earl N. McKinney did heretofore, to wit, on or about the month of January, 1914, make, execute and deliver to the defendant, William Cowan, a chattel mortgage for the sum of Four Thousand Six Hundred Dollars (\$4,600.00), lawful money of the United States, on all the cattle branded E R L on the left side and their increase ranging in the Sulphur Springs Valley, Cochise County, Arizona, the defendant Earl N. McKinney did also heretofore, to wit, on about the month of February, 1914, make, execute and deliver to defendant, William Cowan, a mortgage for the sum of Two Thousand Dollars (\$2,000) on thirty (30) head of milch cows, fourteen (14) head of horses, two (2) De Laval separators, two (2) delivery wagons, two (2) feed wagons, all dairying utensils of every description and kind, all on the lands above described. And the defendant, Earl N. McKinney, did heretofore, to wit, on or about the month of October, 1914 make execute and deliver to the defendant, William Cowan, a chattel mortgage for the sum of One Thousand Six Hundred Dollars (\$1,600), on thirty-five (35) head of cows and twenty-six (26) calves, all on the lands above described. And the defendant Earl N. McKinney did heretofore, to wit, on or about the 10th day of May, 1917, make, execute and deliver to the defendant, William Cowan, a chattel mortgage for the sum of Three Hundred Dollars (\$300) on one (1) Ford Automobile, which said mortgage was abstracted and filed in Book 6 of chattel mort-

gages, Records of Cochise County, Arizona, on the 11th day of June, 1917; that said last described mortgage was bogus and fraudulent from its inception in this, to wit, that the defendant William Cowan did not give to the defendant Earl N. McKinney and the defendant Earl N. McKinney did not receive from the defendant William Cowan any consideration whatsoever for said mortgage, but that the same was made, executed, delivered and recorded as aforesaid for the express purpose [106] and with the intent of both the defendant Earl N. McKinney and the defendant William Cowan to cover up the said automobile so mortgaged from the creditors of the defendant Earl N. McKinney, and to delay, hinder and obstruct said creditors in the collection of their just debts.

V.

That the plaintiff is creditably informed, and believes and on such information and belief alleges that the defendant Earl N. McKinney caused to be paid, and did pay to the defendant William Cowan, all the interest accrued on the above mortgages from the date of their execution up to and including the 20th day of November, 1917, and that the defendant Earl N. McKinney did prior to the 20th day of November, 1917, pay and cause to be paid to the defendant William Cowan, on account of the mortgages heretofore set forth, in addition to the interest aforesaid, the sum of approximately Four Thousand Dollars (\$4,000), the exact amount of said payments and the dates thereof being to the plaintiff unknown, and that the plaintiff has made

diligent inquiry but is unable to give the exact amount of said credit, the exact information concerning the same being known only to the defendants William Cowan, and Earl N. McKinney; that there was, on or about the 20th day of November, 1917, justly due and owing to the said defendant William Cowan, from the defendant Earl N. McKinney on account of the aforesaid mortgages, approximately Fifteen Thousand Dollars (\$15,000), lawful money of the United States.

VI.

That heretofore, to wit, on or about the 20th day of November, 1917, and before the institution of the proceedings in bankruptcy, as aforesaid, by the defendant Earl N. McKinney, the defendants William Cowan and Earl N. McKinney did knowingly, designedly and intentionally, and with intent then and there to defraud the creditors of the said Earl N. McKinney, enter into a fraudulent scheme and design, each with the other, and did pursuant thereto have a verbal agreement and understanding, each with the other, that the defendant William Cowan would abandon his mortgages on the property of the defendant Earl N. McKinney, as above set forth, and that the defendant William Cowan [107] would take over all the property belonging to the defendant Earl N. McKinney as set forth and described in this complaint, and of the then value of Forty-eight Thousand Four Hundred Seventy-five Dollars (\$48,475.00), lawful money of the United States, and would cover the same up from the creditors of the said Earl N. McKinney, and that the

defendant William Cowan would place a man in charge of said property to act jointly with the defendant Earl N. McKinney in running said business, and that the defendant William Cowan collected all the rents, issues and profits of said property, and the dairy business run in connection therewith, and apply the same to the discharge of the mortgage lien that he held against the same, and that after this debt was all paid that he would return all of said property to the said Earl N. McKinney, or continue to hold the same in trust for his use and benefit if the said Earl N. McKinney so desired to further cover up said property from his creditors, and the defendant Earl N. McKinney and the defendant William Cowan did then and there also, knowingly, designedly and intentionally, and with intent then and there to defraud the creditors of the said Earl N. McKinney, enter into the further fraudulent scheme and design, each with the other, that the defendant William Cowan would institute in the Superior Court of Cochise County, State of Arizona, an action to foreclose the mortgages and liens on the property of the said defendant Earl N. McKinney, without allowing upon the record and in the judgment any credits on either interest or principal that the said defendant Earl N. McKinney had paid to the defendant William Cowan on account of said mortgages, and would also make such judgment include in its amount the sum of Three Hundred Dollars (\$300), being the amount of the bogus and fraudulent mortgage given by the defendant Earl N. McKin-

ney to the defendant William Cowan on a Ford Automobile truck, and for which the defendant Earl N. McKinney never received any consideration, as hereinbefore set forth, and that after said action should be instituted by the defendant William Cowan, that the defendant Earl N. McKinney would enter a confession of judgment thereon that pursuant to said scheme and design the defendant William Cowan did on or about the 20th day of November, 1917, and in accordance with his agreement with the defendant Earl N. McKinney so to do [108] abandon his mortgages on said property and did go upon the lands and premises belonging to the defendant Earl N. McKinney as hereinbefore specifically set forth, and did take possession of all of said property, the same being of the then value of Forty-eight Thousand Four Hundred Seventy-five Dollars (\$48,475.00) and did place a party in joint control thereof with the defendant Earl N. McKinney, and did thereafter conduct the dairy business and receive all the rents and issues and profits therefrom and convert the same to his own use and benefit, and did thereafter and in accordance with the agreement and understanding between he and the defendant Earl N. McKinney institute in the Superior Court of Cochise County, State of Arizona, an action to foreclose the aforesaid mortgages in the sum of Twenty Thousand Four Hundred Seventeen Dollars (\$20,417.00) and did fail in said action to foreclose to give the defendant Earl N. McKinney any credit for the sums that he had paid on either the principal or interest,

and that the said Earl N. McKinney in accordance with his agreement and understanding with the said William Cowan did make and send to the Superior Court of Cochise County, Arizona, through the attorney of the defendant William Cowan, in said action, his confession of judgment for said sum of \$20,417.00 and that thereafter and on or about the 1st day of April, 1918, the defendant William Cowan, in furtherance of said scheme and design to cheat and defraud the creditors of the said Earl N. McKinney, and with intent to cheat and defraud the same, did wilfully, designedly and without any authority of law forcibly oust the defendant Earl N. McKinney from the joint control and possession of all of said real and personal property, and did appropriate the same and all thereof to his own use, benefit, said property being of then value of \$48,475.00, lawful money of the United States, and ever since said date has continued in possession of and to exercise control over all of said property and to use the same as his own, and to receive the rents, issues and profits of same; that this plaintiff has no way of knowing what the rents, issues and profits of said property have been since it has been so taken over by the defendant William Cowan; that all the books, papers, accounts and records showing the same are in the possession [109] of the defendant William Cowan, who refuses to give this plaintiff access thereto; that the defendant William Cowan has not accounted to this plaintiff for said rents, issues and profits on said property and dairy busi-

ness since the same has been taken over by him as aforesaid and has allowed no credit whatsoever on account thereof on the aforesaid mortgage liens.

VII.

That heretofore, to wit, on or about the 1st day of November, 1918, the plaintiff brought a suit in the Superior Court of Cochise County, Arizona, against the defendant William Cowan for an accounting upon the whole of the matters involved herein, and that thereafter, and since said suit was at issue between the parties the defendant William Cowan in case No. 2151, in the Superior Court of Cochise County, Arizona, entitled William Cowan, Plaintiff, vs. Earl McKinney, Defendant, and being the same action brought by the said William Cowan in accordance with the aforesaid fraudulent scheme and design between the said William Cowan and the defendant Earl N. McKinney, and in which the said defendant Earl N. McKinney made a written confession of judgment as aforesaid, did on said confession of judgment obtain judgment against the defendant Earl N. McKinney for the sum of Twenty Thousand Four Hundred Seventeen Dollars (\$20,417.00) and foreclosing the mortgage liens on defendant McKinney's property, hereinbefore set forth, and did obtain, out of said court, an execution against all of the property aforesaid, and did place said execution in the hands of the sheriff of Cochise County, Arizona, and did cause the sheriff of Cochise County, Arizona, to advertise all of said property for sale at public auction on the 13th day of January, 1919, and will, unless re-

strained by order of this court, have the same sold by the sheriff of Cochise County, Arizona, on said date, to satisfy said judgment so obtained as aforesaid.

VIII.

That since the mortgages above set forth were made and executed by the defendant Earl N. McKinney to the defendant William Cowan the defendant Earl N. McKinney sold and disposed of a great deal [110] of the property set forth and described in said mortgages and brought other dairy cows and dairy cattle and placed them in said business instead of the ones so mortgaged, and the plaintiff is informed and believes and on such information and belief alleges that on the 20th day of November, 1917, when the defendant William Cowan took over said property as hereinbefore alleged that there was but ten cows and dairy cattle so taken over by the defendant William Cowan, upon which the defendant William Cowan had any mortgage, and that there was ninety (90) dairy cows and one hundred fifty head (50) of young dairy stock so taken over by the said William Cowan on which he held no mortgage and on which he had no mortgage lien. That the plaintiff has no way of identifying the cows and dairy cattle included in said mortgages and those not included therein. That the Referee in Bankruptcy for the District Court of the United States for the District of Arizona had the defendant William Cowan subpoenaed before him that he might testify of and concerning these matters, but that the defendant

William Cowan failed and refused to obey said subpoena and to so testify. That the defendant William Cowan is proceeding to sell, under said judgment, and execution, aforesaid, and the sheriff will on the 13th day of January, 1919, sell all of said cattle those not included in the mortgage as well as those included therein, unless restrained by order of this court.

IX.

That the plaintiff has no speedy, adequate or sufficient remedy at law, and unless an injunction is granted preventing the enforcement of the judgment obtained by the defendant William Cowan against the defendant Earl N. McKinney, as aforesaid, and unless the sheriff of Cochise County, Arizona, is restrained from selling the property under the execution issued aforesaid, the estate of the said Earl N. McKinney, bankrupt as aforesaid, and the unsecured creditors thereof will be irreparably injured.

X.

That there is no adequate time in which this plaintiff can give notice to the defendant of his intention to apply to the Court for a [111] restraining order; that should he wait to give this notice said property will be sold under said judgment and the injury will be complete.

WHEREFORE plaintiff prays that this court issue a temporary restraining order restraining, inhibiting and enjoining the defendant, William Cowan, from enforcing the judgment obtained by him against the defendant Earl N. McKinney, in

the Superior Court of Cochise County, Arizona, in case No. 2151, and that the defendant James McDonald, Sheriff of Cochise County, State of Arizona, be temporarily restrained, inhibited and enjoined from enforcing the execution issued on said judgment, and from selling any of the property described in this complaint thereunder; that upon final hearing that these restraining orders be made permanent; that upon final hearing hereof that this action be consolidated with the action for accounting brought by this plaintiff in the Superior Court of Cochise County, Arizona, against the defendant, William Cowan, as set forth in this complaint, and that all matters in controversy be settled and determined in said accounting, and that such judgment be entered as is just and proper in the premises and that the plaintiff have such other, further and general relief as to equity seems *mete* and proper.

MANATT & STEPHENSON,
Attorneys for Plaintiff.

State of Arizona,
County of Cochise,—ss.

John P. Cull, being first duly sworn, on his oath deposes and says: That he is the trustee in bankruptcy of the estate of the defendant Earl N. McKinney, a bankrupt, and as such is the plaintiff in this action; that he has read the foregoing complaint and knows the contents thereof, and that the facts and allegations therein contained are true of his own knowledge, except those facts therein

stated on information and belief, and as to those he believes them to be true.

JOHN P. CULL. [112]

Subscribed and sworn to before me this 6th day of January, 1919.

[Seal]

H. D. PALMER,
Notary Public.

My commission expires, June 1, 1921.

[Indorsed on the back:] Filed Jan. 8, 1919. J. E. James, Clerk Superior Court.

In the Superior Court of the State of Arizona, in
and for Cochise County.

JOHN P. CULL, Trustee,

Plaintiff,

vs.

WILLIAM COWAN, EARL N. McKINNEY, and
JAMES F. McDONALD, Sheriff for Cochise
County, State of Arizona,

Defendants.

BOND ON RESTRAINING ORDER.

Whereas the above-named plaintiff is about to commence *and* action and has commenced his action in the above Court the Superior Court of the State of Arizona in and for Cochise County, against the above-named defendants, and has applied for a restraining order in said action against the above-named defendants William Cowan and James F. McDonald, sheriff aforesaid, enjoining and restraining them from the commission of certain acts, the

sale of certain property, under execution and notice of sale as in the complaint in said action is more particularly set forth and described, and on application to the Court and Judge thereof said restraining order is granted and issued without notice, and the bond therefor is fixed in the penal sum of One Thousand Dollars.

Now, therefore, we, the undersigned residents of the county of Cochise, State of Arizona, in consideration of the premises and the issuing of said restraining order, do jointly and severally undertake in [113] the sum of One Thousand Dollars (\$1000.00) and promise to the effect that in case said restraining order shall issue the said plaintiff will pay to said parties restrained such damages not exceeding the sum of One Thousand Dollars as such parties may sustain by reason of said restraining order if the said Superior Court should finally decide that the said plaintiff is not entitled thereto.

IN WITNESS WHEREOF we have this 7th day of January, 1919, attached our signatures hereto.

JOHN P. CULL.

J. M. HAMILTON.

J. T. HOOD.

State of Arizona,
County of Cochise,—ss.

J. M. Hamilton and J. T. Hood, the sureties in the above undertaking and bond, being each duly sworn, each for himself and not for the other says that he is worth the sum of One Thousand Dollars over and above his just debts and liabilities and over and above all property exempt by law from execu-

tion and forced sale and that he is a resident and freeholder within the county of Cochise and State of Arizona.

J. T. HOOD.

J. M. HAMILTON.

Subscribed and sworn to before me this 7 day of January, A. D. 1919.

[Seal]

J. D. PALMER,
Notary Public.

My commission expires Jan. 1st, 1921.

[Indorsed on the back:] Approved Jan. 9, 1919.
J. M. Phillipowski, Court Commissioner. Filed
Jan. 8, 1919. J. E. James, Clerk Superior Court.
[114]

In the Superior Court in the County of Cochise,
State of Arizona.

JOHN P. CULL, Trustee in Bankruptcy of the Es-
tate of EARL N. McKINNEY, a Bankrupt,
Plaintiff,

vs.

WILLIAM COWAN, EARL N. McKINNEY, and
JAMES McDONALD, Sheriff of Cochise
County, in the State of Arizona,
Defendant.

Action Brought in the Superior Court of the State
of Arizona, in and for the County of Cochise
and the Complaint Filed in the said County of
Cochise, in the Office of the Clerk of said Su-
perior Court.

The State of Arizona Sends GREETING: To William Cowan, Earl N. McKinney and James McDonald, Sheriff of Cochise County, in the State of Arizona:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the Superior Court of the State of Arizona, in and for the County of Cochise, and to answer the complaint filed therein within twenty days (exclusive of the day of service) after the service on you of this summons (if served within the county otherwise within thirty days) or judgment by default will be taken against you according to the prayer of said complaint.

Given under my hand and the Seal of the Superior Court of the State of Arizona, in and for the County of Cochise, this 8th day of January in the year of our Lord one thousand nine hundred and nineteen.

[Seal]

J. E. JAMES,
Clerk.

By _____,
Deputy Clerk.

[On back:]

State of Arizona,
County of Cochise,
Office of Sheriff,—ss.

I, Porter McDonald, Constable Precinct #1 of Cochise County, State of Arizona, hereby certify that I received the within summons on the 8th day of January, 1919, and personally served the same upon [115] _____, of the defendant—

named in said summons, by delivering to and leaving with each of said defendants hereinafter named, personally, at the time and place set out opposite the name of each of the said defendant—, within the County of Cochise, State of Arizona, a copy of said summons and a true and correct copy of the complaint in the action named in said summons attached to said copy of summons.

Name.	Date served.	Where served.
-------	--------------	---------------

William Cowan.	Jan. 10, 1919.	Ranch.
----------------	----------------	--------

James McDonald, Sheriff of Cochise County in the State of Arizona, Jan. 10th, 1919, @ 4 o'clock P. M.,
--

by delivering to and leaving with G. R. Henshaw, Chief Deputy Sheriff under James McDonald, Sheriff of said County and State, in the office of said Sheriff, within Cochise County, State of Arizona, during office hours.

Dated this 10th day of January, 1919.

PORTER McDONALD,
Constable Precinct #1, Cochise.

By _____,
Deputy Sheriff.

[Endorsements]: No. 2861. Superior Court, County of Cochise, State of Arizona. John P. Cull, Trustee, etc., Plaintiff, vs. William Cowan, et al., Defendants. Summons. Manatt & Stephenson, Plaintiff— Attys. Filed Jan. 10, 1919. J. E. James, Clerk of the Superior Court. By H. P. Johnson, Deputy.

State of Arizona,
County of Cochise,
Justice Precinct No. 1,
Office of Constable,—ss.

I, Porter McDonald, Constable of Precinct No. One, County of Cochise, State of Arizona, hereby certify that I received the hereunto annexed temporary restraining order on the 8th day of January, 1919, and personally served the same on the 10th day of January, 1919, upon William Cowan and James McDonald, Sheriff of Cochise County, in the State of Arizona, they being two of the defendants named in temporary [116] restraining order, by delivering to and leaving with William Cowan at his ranch within the County of Cochise, State of Arizona, a true and correct certified copy of said temporary restraining order; and by delivering to and leaving with Geo. R. Henshaw, Chief Deputy Sheriff under James McDonald, Sheriff of said County and State, in the office of said Sheriff during office hours, to wit, at the hour of 4 o'clock P. M., within the County of Cochise, State of Arizona, a true and correct certified copy of said restraining order.

Dated this 10th day of January, 1919.

PORTER McDONALD,
Constable Precinct No. One, County of Cochise,
State of Arizona.

In the Superior Court of the State of Arizona, in
and for the County of Cochise.

JOHN P. CULL, Trustee in Bankruptcy of the Es-
tate of EARL N. McKINNEY, a Bankrupt,
Plaintiff,

vs.

WILLIAM COWAN, EARL N. McKINNEY and
JAMES McDONALD, Sheriff of Cochise
County, in the State of Arizona,
Defendants.

TEMPORARY RESTRAINING ORDER.

On the reading and filing of the verified complaint in the above-entitled action it is hereby ordered that the defendants, and each of them, appear before the Superior Court of the State of Arizona, in and for the County of Cochise, on the 15th day of January, 1919, or as soon thereafter as said Court may hear them, to show cause, if any they have, why they, and each of them, should not be enjoined and restrained from enforcing and collecting the judgment in case No. 2151 in the Superior Court of the State of Arizona, in and for the County of Cochise, in which William Cowan is plaintiff and Earl McKinney is defendant, and from selling the property now advertised for sale on the 13th day of January, 1919, by the Sheriff of Cochise County, [117] Arizona, under an execution in his hands issued out of the Clerk's office of the Superior Court of Cochise County, State of Arizona, in the above-entitled action, and why the prayer of said

complaint should not be granted. And pending the hearing, you and each of you said defendants are hereby restrained, inhibited and enjoined from collecting or in any way enforcing said judgment, or selling or attempting to sell any property on execution thereunder until the further order of this Court.

That this order is granted by the undersigned Judge of the Superior Court of the State of Arizona, in and for the County of Pima, at chambers, at the courthouse in the county of Pima, State of Arizona, upon the showing first having been made that the Hon. Alfred C. Lockwood, Judge of the Superior Court of the county of Cochise, State of Arizona, is now absent from said County of Cochise, and could not be procured to grant this writ in time to save the plaintiff irreparable injury.

That a bond is fixed herein at the sum of One Thousand Dollars, and this order shall be in full force and effect when said bond is given by the plaintiff herein and approved by the Clerk of the Superior Court of Cochise County, Arizona, and not until then.

And it is further ordered that a copy of the complaint in this suit, together with this order be served upon the defendants.

Dated this 7th day of January, 1919, at 2 P. M.

G. W. SHUTE,

Judge of the Superior Court of Gila County, Arizona, Acting for Judge Pattee of Pima Co., Because of Illness and Disqualification of Judge Pattee.

[Indorsed on the back:] Filed Jan. 10, 1919.
J. E. James, Clerk of the Superior Court. By H.
P. Johnson, Deputy. [118]

In the Superior Court of the State of Arizona, in
and for the County of Cochise.

JOHN P. CULL, Trustee in Bankruptcy of the Es-
tate of EARL N. McKINNEY, a Bankrupt,
Plaintiff,

vs.

WILLIAM COWAN, EARL N. McKINNEY, and
JAMES McDONAIL, Sheriff of Cochise
County, in the State of Arizona,
Defendants.

MOTION.

Now come the defendants in the above-outlined
cause and move this Court dissolve the restraining
order issued in said cause by G. W. Shure, Judge
of the Superior Court of Pima County, on the 7th
day of January, 1919.

DAVID BENSHIMOL,
J. T. KINGSBURY,
Attorneys for the Defendants.

[Indorsed on the back:] Filed Jan. 15, 1919.
J. E. James, Clerk Superior Court. By H. P.
Johnson, Deputy. [119]

In the Superior Court of the State of Arizona, in
and for the County of Cochise.

JOHN P. CULL, Trustee in Bankruptcy of the Es-
tate of EARL N. McKINNEY, a Bankrupt,
Plaintiff,

vs.

WILLIAM COWAN, EARL N. McKINNEY and
JAMES McDONALD, Sheriff of Cochise
County, in the State of Arizona,
Defendants.

DEMURRER OF THE DEFENDANT WILL-
IAM COWAN.

Comes now the defendant William Cowan in the
above-entitled action—

I.

Demurs to the complaint because the facts therein
alleged do not constitute a cause of action.

II.

This defendant especially demurs to the complaint
for the reason that it appears by the allegations
thereof and references to the complaint brought by
this same plaintiff in the action No. 2818 in said
Superior Court that this action is inconsistent with
said action No. 2818; that if the purpose of the
present action is to enjoin the sale of the mort-
gaged property for the reasons alleged, the alleged
claim or inference of the conversion of said prop-
erty by this defendant in said action No. 2818
would give this plaintiff no right or interest in said

property except as to the value of the property alleged to have been converted.

III.

The defendant further especially demurs to the complaint on the ground that this Court has no jurisdiction of the subject of this action in that the allegations of the complaint admit that in action No. 2851 in this court this defendant has obtained judgment and a valid legal execution was issued thereon that no appeal has ever been taken from the judgment therein and no stay of execution or suspension of the execution made or issued.

DAVID BENSHIMOL,
J. T. KINGSBURY,

Attorneys for the Defendants. [120]

State of Arizona,
County of Cochise,—ss.

David Benshimol, being duly sworn, on oath depose—and say—that he is one of the attorneys for the defendants; that he is familiar with the facts set forth in the complaint, that he has read the foregoing *answer* and knows the conditions thereof and that the allegations therein contained are true of his own knowledge except facts therein stated on information and belief and as to these he believes them to be true.

DAVID BENSHIMOL.

Subscribed and sworn to before me this 14th day of January, 1919.

[Seal]

H. W. WILLIAMS,
Notary Public.

My commission expires Feby. 19, 1920.

[Indorsed on the back:]

Copy of within received this 14th day of January, 1919.

Attorneys for Plaintiff.

Filed Jan. 15, 1919. J. E. James, Clerk Superior Court. By H. P. Johnson, Deputy.

In the Superior Court of the State of Arizona, in
and for the County of Cochise.

No. 2861.

JOHN P. CULL, Trustee,

vs.

WILLIAM COWAN, Deft.

COST BILL.

To Clerk of Court, filing answer \$5.00
State of Arizona,
Cochise County,—ss.

J. T. Kingsbury, having been first sworn, says that the above statement of costs of defendant is true and correct, and that he is the [121] attorney for defendant.

J. T. KINGSBURY.

Subscribed and sworn to before me this 10th day of Nov., 1919.

[Seal]

J. E. JAMES,
Clerk.

By H. P. Johnson,
Deputy.

[Indorsed on the back:] Filed Nov. 10, 1919.
J. E. James, Clerk Superior Court. By C. S. Bach-
elder, Deputy.

In the Superior Court of the State of Arizona, in
and for the County of Cochise.

Court convened pursuant to recess at 10:00 o'clock
A. M. Present: Hon. Alfred C. Lockwood,
Judge; R. N. French, County Attorney; J. F.
McDonald, Sheriff; J. M. Phillipowski, Re-
porter; J. E. James, Clerk.

Court was duly opened by the officers, according
to law.

2861'

JOHN P. CULL, etc.,

vs.

WILLIAM COWAN et al.

CERTIFIED COPY OF MINUTES.

Minute Entry of January 11, 1919, Book 27, Page
462.

It is by the Court ordered that the hearing on law
petition for injunction herein be and the same is
hereby continued to January 18, 1919.

Minute Entry January 18, 1919, Book 27 Page 493.

It is by the Court ordered that the hearing on law
points herein be and the same is hereby continued
to January 25, 1919.

Minute Entry January 25, 1919, Book 27, Page 498.

Counsel argued and submitted the motion of the
defendants to dissolve the temporary restraining

order heretofore granted herein and the Court granted the same. Counsel for the plaintiff gave oral notice of appeal to the Supreme Court of the State of Arizona, from [122] the order granting said motion and from the whole thereof. On motion of counsel for the plaintiff the Court fixed a supersedeas bond in the sum of \$43,000.00.

Minute Entry of February 15, 1919, Book 27, page 586.

It is by the Court ordered that March 1st, 1919, be and the same is hereby set as the date for hearing on law points herein.

Minute Entry March 1st, 1919, Book 28, page 58.

It is by the Court ordered that the hearing on law points herein be, and the same is hereby continued to March 8th, 1919.

Minute Entry March 13th, 1919, Book 28, page 93.

It is by the Court ordered that the hearing on law points herein be and the same is hereby continued to March 15, 1919.

Minute Entry March 15, 1919, Book 28, page 98.

It is by the Court ordered that the hearing on law points herein be and the same is hereby continued to March 29, 1919.

Minute Entry March 29, 1919, Book 28, Page 153.

It is by the Court ordered that the hearing on law points herein be and the same is hereby continued to April 5, 1919.

Minute Entry April 5, 1919, Book 28, Page 174.

It is by the Court ordered that the hearing on law points herein be and the same is hereby continued to April 12, 1919.

Minute Entry April 12, 1919, Book 28, Page 194.

This cause came on this date for hearing on the Demurrer of the defendant to the complaint herein, the Court heard counsel on the demurrer and took same under advisement.

Minute Entry of November 18, 1919, Book 29, Page
79.

On motion of the plaintiff it is by the Court ordered that [123] this action be, and the same is hereby dismissed without prejudice, upon the payment of the costs by the plaintiff.

ALFRED C. LOCKWOOD,
Judge of the Superior Court.
(On Cover:)

State of Arizona,
County of Cochise,—ss.

I, J. E. James, Clerk of the Superior Court of the State of Arizona, in and for the County of Cochise, hereby certify the annexed and foregoing to be a full, true and correct copy of entire record and minutes in case No. 2861, John P. Cull, etc., Plaintiff, vs. William Cowan, et al., Defendant, the originals thereof now remaining on file in the office of said Clerk in the City of Tombstone, said state and county aforesaid.

Witness my hand and the Seal of said Superior Court this 8th day of July, 1921.

[Seal]

J. E. JAMES,
Clerk of the Superior Court.

By H. P. Johnson,
Deputy.

[Endorsed on back:] Filed this 18th day of July, 1921, at 2 o'clock P. M. F. H. Bernard, Referee in Bankruptcy.

(Endorsement of the Clerk of the United States District Court for the District of Arizona: The following papers filed under one cover: Petition for Review, Exhibit "A," Exhibit "B." Filed Jul. 19, 1921. C. R. McFall, Clerk. By Lella Spence, Deputy.) [124]

In the District Court of the United States, for the
District of Arizona.

No. B—31 (TUCSON).

In the Matter of EARL N. McKINNEY, Bankrupt.

Certificate of Review.

To the Hon. WILLIAM H. SAWTELLE, District
Judge:

I, F. H. Bernard, the Referee in Bankruptcy in charge of this proceeding, do hereby certify:

That in the course of such proceeding certain findings of fact and conclusions of law, a copy whereof is handed up herewith, were made and entered by me on the 16th day of May, 1921.

That on the 18th day of July, 1921, William Cowan, feeling aggrieved thereat, filed a petition for a review which was granted.

That a summary of the evidence is handed up herewith that the question presented on this review is whether on the record in this case William Cowan,

the respondent to a petition filed herein by the Trustee, and who has appeared especially to interpose a preliminary objection to the jurisdiction of this Referee, is an adverse claimant to the funds resulting from the sale of certain property formerly belonging to the Bankrupt and the proceeds of which sale were claimed by the Trustee as part of the Bankrupt's estate.

I hand up herewith for the information of the Judge the following papers:

1. A record of this proceeding.
2. The petition on which this certificate is granted.
3. All papers filed with me herein which are pertinent to this review.

Dated at Tucson, Arizona, this 19th day of July, 1921.

Respectfully submitted,
F. H. BERNARD,
Referee in Bankruptcy.

[Endorsement on back:] Certificate of Review.
Filed Jul. 19, 1921. C. R. McFall, Clerk. By Lella Spence, Deputy. [125]

In the United States District Court for the District
of Arizona.

B—31—TUCSON.

In the Matter of EARL N. McKINNEY, Bankrupt.

Notice for Hearing Petition for Review.

To the Referee in Bankruptcy and to Messrs.
Manatt & Stephenson:

YOU, AND EACH OF YOU, TAKE NOTICE:
That on Friday, September 16, 1921, at the hour
of 10:00 o'clock A. M. or as soon thereafter as
counsel can be heard, I will call up for hearing the
determination of the petition of William Cowan for
Review of the Referee's Findings of Fact and Con-
clusions of Law heretofore filed herein.

DAVID BENSIMOL,
Attorney for William Cowan.

Copy hereof received this 8 day of September,
1921.

MANATT & STEPHENSON,
Attorneys for Trustee.

Copy hereof received this 9th day of September,
1921.

F. H. BERNARD,
Referee in Bankruptcy.

[Endorsement on back:] Filed Sep. 10, 1921.
C. R. McFall, Clerk. [126]

May, 1921, Term—Monday, October 17th, 1921—
Tucson.

In the District Court of the United States, for the
District of Arizona.

Honorable WILLIAM H. SAWTELLE, United
States District Judge, Presiding.

MINUTE ENTRY.

B—31.

In the Matter of EARL N. McKINNEY, Bankrupt.

**Minutes of Court—October 17, 1921—Order Fixing
Date of Hearing.**

The petition of William Cowan, for review of Referee's findings herein, comes on regularly for hearing this day. No solicitor appears for the interested parties in this matter.

It is ordered that said petition be set down for hearing before this Court November 1st, 1921, at 10: A. M. [127]

In the District Court of the United States in and
for the State of Arizona.

No. B—31—TUCSON.

In the Matter of EARL McKINNEY, Bankrupt.

Motion to Strike Petition for Review and Dismissal of Same.

Comes now the trustee J. P. Cull by his attorney and moves the Court to dismiss the proceedings

of William Cowan, and his said petition for review and strike same from the files for the following reasons to wit:

I.

That as is shown by the files and records of this matter and the files herein, said William Cowan, from his own fault and negligence, allowed sixty days to *elaps*, after the filing and service of the findings of fact and conclusions of law, made and entered by the Referee, before filing or serving his said pretended petition for review, which said petition for review was at no time served on said Trustee or his attorney, and the time allowed to elapse by said Cowan is contrary to the rules of this Court and contrary to the rules of practice in such cases under the established rules of law.

II.

That the findings of fact and conclusions of law of the Referee were arrived at after full and complete hearing and trial at which times and places the said Cowan and his attorney were present and participated therein, and the results arrived at by the referee, is a decision and judgement, and not an order as is contemplated under Sec. 39 of Bankrupt Act, and Supreme Court Order No. 27, and subject to review by proper petition, and this pretended petition for review, gives this Court no jurisdiction to review the Referee's findings herein.

[128]

III.

That the said pretended petition for review is insufficient in substance and in form, and failes to

specifically point out any error in the rulings or order made by the Referee, and duly excepted to, and is a mere argument as to what "appears" to have been done by the Referee, and the same is wholly insufficient to inform the Court as to the specific errors complained of.

C. V. MANATT,

Attorney for Trustee.

[Endorsement on back:] Filed Oct. 26, 1921.
C. R. McFall, Clerk. By Preston Turner, Deputy.
[129]

In the District Court of the United States in and
for the State of Arizona.

No. 31—B (TUCSON).

In the Matter of EARL McKINNEY, Bankrupt.

Affidavit of Service.

State of Arizona,
County of Cochise,—ss.

C. V. Manatt, of lawful age, being first duly sworn on his oath deposes and says that he is the attorney of record and by appointment of the Trustee John P. Cull in the above and foregoing matter, and that he served his motion to strike and dismiss the petition for review of William Cowan on the attorney of record for said Cowan, David Benshimol, in the City of Douglas, Arizona, on the 27th day of October, 1921, by mailing to said Benshimol at his known address a true and correct copy of the same,

all postage thereon when deposited in the postoffice at Douglas, Arizona, being fully prepaid thereon.

C. V. MANATT.

Subscribed and sworn to before me this 27th day of October, 1921.

[Seal]

GEO. M. ROARK,
Notary Public.

My commission expires 2/11/22.

[Endorsement on back:] Affidavit of Service of Copy on David Benshimol. Filed Oct. 21, 1921. C. R. McFall, Clerk. By Preston Turner, Deputy.
[130]

May, 1921, Term—Tuesday, November 1st, 1921—
Tucson.

In the District Court of the United States, for the
District of Arizona.

Honorable WILLIAM H. SAWTELLE, United
States District Judge, Presiding.

MINUTE ENTRY.

B—31.

In the Matter of EARL McKINNEY, Bankrupt.

**Minutes of Court—November 1, 1921—Order Over-
ruling Motion to Dismiss.**

The petition of William Cowan for review of the Referee's findings of fact herein, together with trustee's motion to dismiss said petition, come on regularly for hearing this day. David Benshimol, Esq., appearing as the solicitor for the petitioner,

William Cowan, and F. H. Bernard, Esq., Referee herein, appearing in person. The matters above referred to are considered by the Court.

Whereupon the Court does order that the motion to dismiss on the ground that the petition for review was not filed in time is overruled.

The petition for review is taken under advisement by the Court and the petitioner granted ten days within which to file his memorandum of points and authorities in support of the same. [131]

May, 1922, Term—Tuesday, September 5, 1922.—
Tucson.

In the District Court of the United States for the
District of Arizona.

Honorable WILLIAM H. SAWTELLE, United
States District Judge, Presiding.

MINUTE ENTRY.

B—31.

In the Matter of EARL N. McKINNEY, Bankrupt.

Minutes of Court—September 5, 1922—Order Affirming Referee's Findings of Fact and Conclusions of Law.

The petition of William Cowan, filed herein July 19, 1921, having been heretofore submitted to the Court, and by the Court taken under advisement, and the Court, having fully considered the same, does now order that the petitioner's motion to dismiss for want of jurisdiction in the Referee or this

Court be, and the same is, hereby overruled, the Court being of the opinion that the Referee was within his rights and proceeded lawfully in instituting summary proceedings referred to in the *the* said petition, and that it was not necessary that the matters and things referred to in said petition be determined in a plenary action;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the findings of fact and conclusions of law made by the Referee be, and the same are, hereby affirmed.

IT IS FURTHER ORDERED that the Clerk send papers and records in this case back to the Referee for further proceedings in accordance with this decision. [132]

In the District Court of the United States for the District of Arizona.

No. B-31—TUCSON.

In the Matter of EARL McKINNEY, Bankrupt.

**Petition for Appeal to Circuit Court of Appeals
and Order Allowing Same.**

Comes now William Cowan, petitioner in the above-entitled matter, and conceiving himself aggrieved by that certain order, judgment, or decree made and entered in the above entitled matter on the 5th day of September, 1922, does hereby appeal from said order, judgment, or decree to the United States Circuit Court of Appeals for the Ninth Cir-

cuit, for the reasons specified in the assignment of errors which is filed herewith.

And said William Cowan, petitioner, prays that he be allowed this appeal, and that the transcript of record, papers and proceedings upon which said order, judgment, or decree was made duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

DAVID BENSHIMOL,
Attorney for Petitioner.

ORDER.

The above petition for appeal to the United States Circuit Court for the Ninth Circuit is hereby allowed.

Sept. 28, 1922.

WM. H. SAWTELLE,
Judge.

[Endorsements on back:]

Receipt of a copy of the enclosed petition for appeal is hereby acknowledged this 14th day of Sept. 1922.

C. V. MANATT,
Atty. for Trustee.

Filed Sep. 15, 1922. C. R. Fall, Clerk. United States District Court for the District of Arizona.
By Paul Dickason, Deputy Clerk. [133]

In the District Court of the United States for the
District of Arizona.

No. B-31—TUCSON.

In the Matter of EARL McKINNEY, Bankrupt.

Assignment of Errors.

Comes now William Cowan, petitioner in the above-entitled matter, and makes and files the following assignment of errors upon which he will rely upon the prosecution of his appeal from that certain order, judgment, or decree made by this Honorable Court, and entered in the above-entitled matter on the 5th day of September, 1922:

First. The Court erred in affirming the findings of fact and conclusions of law made by the referee for the reason that the referee had no jurisdiction in the matter involved, and the said William Cowan specifically objected to, and declared his intention to object to the taking of jurisdiction in said matter by the referee, and has never consented thereto.

Second. The Court erred in affirming the findings of fact and conclusions of law made by the referee for the reason that the subject matter involved in the proceedings is not, and was not within the jurisdiction of the referee.

Third. The Court erred in affirming the findings of fact and conclusions of law made by the referee for the reason that the said William Cowan has not submitted himself, and does not now submit himself to the jurisdiction of the referee, or this Court, except so far as submission, specially, may

be necessary for this Court to determine whether it had jurisdiction herein.

Fourth. The Court erred in affirming the findings of fact (1) and conclusions of law made by the referee for the reason that the said referee and this Court have no jurisdiction herein, these proceedings being summary proceedings. [134]

Fifth. The Court erred in affirming the findings of fact and conclusions of law made by the referee for the reason that this Court has no jurisdiction in this matter because William Cowan is and was in possession of all the matters and things herein involved as an adverse claimant.

Sixth. The Court erred in affirming the findings of fact and conclusions of law made by the referee for the reason that the said referee's overruling of objection to jurisdiction made by said William Cowan, was, for the matters herein recited, without legal effect.

Seventh. The Court erred in affirming the findings of fact and conclusions of law made by the referee for the reason that no foundation is laid in said findings of fact and conclusions of law for any summary proceedings herein.

Eighth. The Court erred in affirming the findings of fact and conclusions of law made by the referee for the reason that the referee had, and has no right to adjudicate upon the matters and things involved herein; that the only person entitled to bring a suit or determine what is to be accounted for, is the trustee; that in such suit said William Cowan would, if he so desired, be entitled to a jury trial.

Ninth. The Court erred in affirming the findings of fact and conclusions of law made by the referee for the reason that the matters and things involved in said findings of fact and conclusions of law are not based upon any petition for relief, or request to the referee for relief on the part of William Cowan.

Tenth. The Court erred in affirming the findings of fact and conclusions of law made by the referee for the reason that (2) there does not appear to have been any application on file in the matter of this estate on the part of the trustee invoking action by the referee.

Eleventh. The Court erred in affirming the findings of fact and conclusions of law made by the referee for the reason that the matters and things involved in the findings of fact and conclusions [135] of law are not based upon any hearing on December 22d, 1919 in which said William Cowan appeared as a party; but it appears that on said date said William Cowan was summoned as a witness to testify as to his transaction with bankrupt.

Twelfth. The Court erred in affirming the findings of fact and conclusions of law made by the referee for the reason that the trustee, John P. Cull, Esq., has twice begun litigation in the Superior Court of the County of Cochise, State of Arizona, upon the matters and things which are the subject of said findings of fact and conclusions of law, to wit, an action for an accounting entitled "John P. Cull, Trustee, vs. William Cowan," numbered 2818, which action was begun on the 30th day of November,

1918, a certified copy of which is included in the record herein; and an action to enjoin the sale under foreclosures of the properties involved under the mortgages mentioned in said findings of fact and conclusions of law, which action was brought in said Superior Court on or about the 8th day of January, 1919, and is numbered 2861 and entitled "John P. Cull, Trustee, vs. William Cowan and James McDonald, Sheriff of Cochise County," a copy of which is included in the record herein.

Thirteenth. The Court erred in affirming the findings of fact and conclusions of law made by the referee for the reason that certain of the findings of fact are based upon deductions of the referee and not upon any evidence, to wit: that there were earnings from the cattle or benefits from the property, (3) when in truth and in fact the holding in possession by said William Cowan pending the delays by the trustee in determining whether he wished to redeem the property from the mortgages to said William Cowan, for the benefit of the estate; and the litigation started by said trustee and carried to the point of the limit of time to complete appeal to the Supreme Court of the State of Arizona, which litigation was then, to wit: on November 8th, 1919, dismissed; caused expense in excess of the interest accruing upon the mortgages held by said Cowan, and any increases in the number of cattle held; that although said William Cowan [136] bid the amount of his said mortgages and interest, at the foreclosure sale, the trustee did not at any time offer to pay said bankrupt's indebted-

ness to said William Cowan, or offer to bid at said sale, and there is no evidence showing that the property sold at foreclosure sale was of the value that said William Cowan bid thereon.

Fourteenth. The Court erred in affirming the findings of fact and conclusions made by the referee for the reason that the said findings of fact and conclusions of law are not based upon any evidence upon which to determine that the sum of One Thousand Two Hundred Sixty-five and 58/100 (\$1,265.58) Dollars was unaccounted for, for two reasons: (1) that the bankrupt had other dealings with said William Cowan than those involved in the mortgages foreclosed; and (2) that all accounts and matters involving all transactions between said bankrupt and said William Cowan were adjusted and settled in the agreement for judgment signed by the bankrupt on January 8th, 1918; that by the terms of the mortgages and notes, upon which said William Cowan was then foreclosing, the said bankrupt was obligated to pay as attorney's fees thereon, in case suit was brought, the sum of One Thousand Nine Hundred Seventy-four and 59/100 (\$1,974.59) Dollars; that said accounting was completed as to all matters (4) between the bankrupt and said William Cowan and said bankrupt owed said William Cowan the said sum of One Thousand Nine Hundred Seventy-four and 59/100 (\$1,974.59) Dollars, as well as the principal and interest of said mortgages.

Fifteenth. The Court erred in affirming the findings of fact and conclusions of law made by the

referee for the reason that there has been no fraud and there is no fraud alleged on the part of William Cowan, which would have been ground for these proceedings.

Sixteenth. The Court erred in affirming the findings of fact and conclusions of law made by the referee for the reason [137] that the property involved in the bankrupt's estate, mortgaged to William Cowan, was at the time of the adjudication, and for a long time after, subject to redemption by the trustee; and that the trustee took no steps to redeem said property, and is guilty of laches.

In order that the foregoing assignment of errors may be and appear of record, the petitioner presents the same to the Court, and prays that such disposition be made thereof as in accordance with law and statutes of the United States in such case made and provided, and petitioner prays a reversal of said order, judgment, or decree appealed from, and each and every part thereof, entered by the United States District Court for the District of Arizona, and revision of said order, judgment, or decree appealed from, and each and every part thereof.

DAVID BENSHIMOL,

Attorney for Petitioner.

[Endorsements on back:]

Receipt of a copy of the within assignment of errors is hereby acknowledged this 14th day of September, 1922.

C. V. MANATT,

Attorney for Trustee.

Filed Sept. 15, 1922. United States District Court for the District of Arizona. C. R. McFall, Clerk. By Paul Dickason, Deputy Clerk. [138]

Stipulation in re Appeal Bond.

DAVID BENSHIMOL,
Attorney and Counselor at Law,
Room 2 Brophy Building,
Douglas, Arizona.

October 4th, 1922.

Hon. Wm. H. Sawtelle,
Judge United States District Court,
Tucson, Ariz.

Dear Sir:

Re: B-31 (TUCSON.)

EARL N. McKINNEY, Bankrupt.

IT IS HEREBY STIPULATED AND AGREED between David Benshimol, attorney for William Cowan, appellant, and C. V. Manatt, representing the Trustee, that the Appeal Bond be made in the sum of Ten Thousand (\$10,000.00) Dollars.

Very truly yours,

DAVID BENSHIMOL,

C. V. MANATT,

Atty. for Trustee.

[Endorsement on back:] Filed Oct. 9, 1922. United States District Court for the District of Arizona. C. R. McFall, Clerk. By Paul Dickason, Deputy Clerk. [139]

In the District Court of the United States for the
District of Arizona.

No. B-31 (TUCSON).

In the Matter of EARL McKINNEY, Bankrupt.

Order Allowing Supersedeas.

The appellant, William Cowan, having heretofore filed his petition for an appeal from a final decree rendered herein on the 5th day of September, 1922, filed in the office of the clerk of the United States District Court on the same date, and overruling this appellant's motion to dismiss for want of jurisdiction, and affirming the findings of fact and conclusions of law made by the Referee herein, and remanding the matter to the Referee for further proceedings, and having filed an assignment of errors, and said appeal having been heretofore allowed to the petitioner, aforesaid—

IT IS ORDERED, that the said appeal shall operate as a supersedeas of the said order, judgment and decree entered herein on the 5th day of September, 1922, and shall stay the execution of said decree pending such appeal upon execution of a bond in the penalty of the sum of Ten Thousand (\$10,000.00) Dollars.

Dated October 16, 1922.

WM. H. SAWTELLE,
U. S. District Judge.

[Endorsement on back:] Filed Oct. 16, 1922.
United States District Court for the District of
Arizona. C. R. McFall, Clerk. By Paul Dickason,
Deputy Clerk. [140]

In the District Court of the United States for the
District of Arizona.

In the Matter of EARL N. McKINNEY, Bankrupt.

Appeal and Supersedeas Bond.

KNOW ALL MEN BY THESE PRESENTS:
That we, William Cowan, the petitioner in the
above-entitled matter, as principal, and A. G. Ste-
venson, of Bisbee, in Cochise County, Arizona, and
W. J. Davis, of McNeal, in said county and State,
are held and firmly bound unto John P. Cull, Trus-
tee in Bankruptcy, in the above-entitled matter, in
the sum of Ten Thousand (\$10,000.00) Dollars, law-
ful money of the United States of America, for the
payment of which well and truly to be made, we
bind ourselves, all and each of our heirs, successors,
and legal representatives, jointly and severally,
firmly by these presents.

Signed with out hands, and sealed with out seals,
this *12th* day of October, 1922.

The condition of the above undertaking is such
that:

WHEREAS, William Cowan, the principal
herein, is desirous of appealing to the United States
Circuit Court of Appeals for the Ninth Circuit,
from that certain decision, order, judgment, and de-
cree rendered and entered against him in the above-
entitled United States District Court, for the Dis-
trict of Arizona on the 5th day of September, 1922,
to wit, the order overruling the petition of said
William Cowan to review certain proceedings at-

tempted to be brought against him, for want of jurisdiction in the Referee in said cause, to wit, also, the order decreeing that the findings of fact and conclusions of law made by the Referee in said proceedings against said Cowan be affirmed, to wit, also the order directing the papers and records to be sent back to the Referee for further proceedings in accordance with said decision; and

WHEREAS, William Cowan, the petitioner herein, is desirous of staying all further proceedings against him by or before the [141] said District Court and by or before the said Referee, in the above-entitled matter,

NOW, THEREFORE, if the above-named principal, William Cowan, shall prosecute his said appeal with effect, and in case the judgment of the United States Circuit Court of Appeals for the Ninth Circuit, shall be against him, perform its judgment, or decree, and pay all such damages and costs as may be awarded against him on appeal, then this obligation to be null and void; otherwise to be and remain in full force and effect.

WILLIAM COWAN,
Principal.

A. G. STEVENSON,
Surety.

W. J. DAVIS,
Surety.

State of Arizona,
County of Cochise,—ss.

A. G. Stevenson and W. J. Davis, being duly sworn, each for himself, says: That he is one of the

sureties named in the above bond; that he is a resident freeholder within the State of Arizona, and is worth the sum of Ten Thousand (\$10,000) Dollars over and above his just debts and liabilities, exclusive of property exempt from execution.

A. G. STEVENSON.

W. J. DAVIS.

Subscribed and sworn to before me this 12th day of October, 1922.

[Seal]

DAVID BENSHIMOL,

Notary Public.

My commission expires Feb. 17, 1924.

Approved Oct. 16, 1922.

WM. H. SAWTELLE,

Judge.

[Endorsement on back:] Filed Oct. 16, 1922.
United States District Court for the District of Arizona. C. R. McFall, Clerk. By Paul Dickason, Deputy Clerk. [142]

In the District Court of the United States for the
District of Arizona.

No. B-31—(TUCSON).

In the Matter of EARL N. McKINNEY, Bankrupt,

Designation of Record.

To John P. Cull, Trustee, and C. V. Manatt, His
Attorney:

You and each of you will please take notice that the errors of the District Court for the District of

Arizona upon which the undersigned petitioner, William Cowan, intends to rely in his petition for revision, and on his appeal from the order of the District Court of the United States for the District of Arizona dated September 5th, 1922, which petition and appeal have heretofore been filed, and a copy thereof served upon you, are the errors of overruling the motion to dismiss for want of jurisdiction, and of affirming those certain findings of fact and conclusions of law made herein by the Referee on the 16th day of May, 1921, as more particularly set forth in the assignment of errors heretofore filed in this matter. As necessary for the consideration thereof, the petitioner aforesaid designates the following record to be printed:

1. The petition in bankruptcy filed April 9th, 1918.
2. Schedules A-2, B-1, and B-2; and the summary of assets and liabilities, filed with and attached to the above petition.
3. Adjudication of bankruptcy, and order of reference dated April 9th, 1918.
4. Order appointing trustee, and bond of trustee, and order approving same, dated April 30th, 1918.
5. Order appointing appraisers, dated April 25th, 1918.
6. Report of Trustee, dated July 31st, 1918, filed August 3d, 1918.
7. Supplemental report of Trustee, dated Oct. 2d, 1918. [143]
8. Statement of Evidence of bankrupt, taken Oct. 21st, 1918.

9. Special report of Trustee, dated Nov. 22d, 1918.
10. Order for trustee to bring suit, dated Nov. 25th, 1918.
11. Report of trustee dated December 4th, 1919.
12. Order citing William Cowan to appear before Referee, dated December 5th, 1919.
13. Referee's findings and order to show cause, filed February 16th, 1920.
14. Special appearance of William Cowan, and objections to Referee's order to show cause, filed March 8th, 1920.
15. Order overruling petition of trustee, dated May 8th, 1920.
16. Certificate by Referee to Judge, dated May 17th, 1920, with testimony of William Cowan as attached thereto.
17. Order for return of files to Referee with instructions, dated June 26th, 1920.
18. Record of proceedings had before the Referee from April 12th, 1918, to July 19th, 1921, as filed July 19th, 1921.
19. Referee's findings of fact and conclusions of law, dated May 16th, 1921, and filed July 19th, 1921.
20. Certificate of review, and petition of William Cowan for review, filed July 19th, 1921.
21. Notice of hearing filed September 10th, 1921.
22. Order setting petition of William Cowan for hearing, dated October 17th, 1921.
23. Trustee's motion to strike, dated October 26th, 1921.
24. Affidavit of service, dated October 31st, 1921.

25. Order overruling Trustee's motion, dated November 1st, 1921.
26. Order of Court, dated September 5th, 1922, denying petition of William Cowan, and affirming Referee's findings, dated May 16th, 1921.
27. Petition of William Cowan for Appeal to United States Circuit Court of Appeals, filed September 15th, 1922, and order allowing same. [144]
28. Assignment of errors filed September 15th, 1922.
29. Citation on appeal, issued Oct. 16, 1922.
30. Appeal and supersedeas bond, filed Oct. 16, 1922.
31. This praecipe, designating record, filed Oct. 12, 1922.

DAVID BENSHIMOL,

Attorney for Petitioner.

[Endorsements on back:]

Receipt of a copy of the enclosed designation of record is hereby acknowledged this 30th day of September 19, 1922.

C. V. MANATT,

Atty. for Defendant in Error.

Filed Oct. 12, 1922. United States District Court for the District of Arizona. C. R. McFall, Clerk.

In the United States District Court for the District
of Arizona.

(B-31.)

WILLIAM COWAN,

Appellant,

vs.

JOHN P. CULL, Trustee in Bankruptcy in the
Matter of EARL N. McKINNEY, Bankrupt,
Appellee.

**Order Enlarging Time to and Including December
15, 1922, to File Record and Docket Cause.**

Good cause appearing therefor—

IT IS ORDERED that the time within which the appellant may file the record on appeal herein and docket this cause with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit be, and the same is hereby enlarged and extended to and including the 15th day of December, 1922.

Dated at Tucson, Arizona, this 9th day of November, 1922.

WM. H. SAWTELLE,
Judge. [146]

[Endorsed]: B-31—Tucson. Filed Nov. 9, 1922.
United States District Court for the District of
Arizona. C. R. McFall, Clerk. By Paul Dickason,
Deputy Clerk. [147]

In the United States District Court for the District
of Arizona.

B-31.

WILLIAM COWAN,

Appellant,

vs.

JOHN P. CULL, Trustee in Bankruptcy in the
Matter of EARL N. McKINNEY, Bankrupt,
Appellee.

**Order Enlarging Time to and Including December
26, 1922, to File Record and Docket Cause.**

Good cause appearing therefor—

IT IS ORDERED that the time within which the
appellant may file the record on appeal herein and
docket this cause with the Clerk of the United States
Circuit Court of Appeals for the Ninth Circuit be,
and the same is hereby enlarged and extended to and
including the 26th day of December, 1922.

Dated at Tucson, Arizona, this 9th day of Decem-
ber, 1922.

WM. H. SAWTELLE,

Judge. [148]

[Endorsed]: B-31—(Tucson). In the United
States District Court for the District of Arizona.
William Cowan, Appellant, vs. John P. Cull, Trus-
tee in Bankruptcy, in the Matter of Earl N. McKin-
ney, Bankrupt, Appellee. Order Enlarging Time to
Dec. 26, 1922, to Docket Appeal. Filed Dec. 9, 1922.

C. R. McFall, Clerk U. S. Dist. Court, Dist. of Arizona. [149]

In the United States Circuit Court of Appeals for
the Ninth Circuit.

WILLIAM COWAN,

Appellant,

vs.

JOHN P. CULL, Trustee in Bankruptcy in the
Matter of EARL N. McKINNEY, Bankrupt,
Appellee.

Citation (Copy).

United States of America,

Ninth Circuit,—ss.

To John P. Cull, Trustee in Bankruptcy in the
Matter of Earl N. McKinney, Bankrupt, Number B-31—(Tucson), United States District Court for the District of Arizona, GREETING:
YOU ARE HEREBY CITED AND ADMONISHED to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, California, on the 15th day of November, A. D. 1922, pursuant to an Appeal allowed in the Clerk's office of the District Court of the United States for the District of Arizona, in the Matter of Earl N. McKinney, Bankrupt, wherein William Cowan is appellant, and John P. Cull, Trustee in Bankruptcy in the Matter of Earl N. McKinney, appellee, to show cause, if any there be, why the judgment in said Appeal

mentioned should not be corrected and speedy justice should not be done to the parties in their behalf.

WITNESS the Honorable JOSEPH McKENNA, Justice of the United States Court of Appeals for the Ninth Circuit, this 16th day of October, in the year of our Lord nineteen hundred and twenty-two.

[Seal] WM. H. SAWTELLE,
District Judge of the United States District Court
for the District of Arizona.

Service of the above citation accepted this 27th day of October, 1922, by me, C. V. Manatt, Attorney of record of said J. P. Cull, Trustee, and I hereby enter my appearance for said J. P. Cull, trustee in the U. S. Circuit Court of Appeals.

C. V. MANATT,
Atty. for Trustee in Bankruptcy in the Matter of
Earl N. McKinney, Bankrupt. [150]

[Endorsement on back:] Filed Oct. 28, 1922.
United States District Court for the District of
Arizona. By Paul Dickason, Deputy Clerk. [151]

In the United States District Court for the District
of Arizona.

No. B-31 (TUCSON).

WILLIAM COWAN,

Appellant,

vs.

JOHN P. CULL, Trustee in Bankruptcy in the
Matter of EARL N. McKINNEY, Bankrupt,
Appellee.

**Certificate of Clerk U. S. District Court to Tran-
script of Record.**

United States of America,
District of Arizona,—ss.

I, C. R. McFall, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the United States District Court for the District of Arizona, including the records, papers and files in the matter of Earl N. McKinney, Bankrupt, Numbered B-31—(Tucson) on the docket of said Court.

I further certify that the attached pages, numbered one to 153, inclusive, contain a full, true and correct transcript of certain records and proceedings in said case, as called for in the designation of record (*praecipe*), filed in this case and made a part of the transcript attached hereto, as the same appear from the originals of record and on file in my

office as such Clerk, in the City of Tucson, State and District aforesaid, except the "Order Appointing Trustee" called for in the 4th paragraph of said praecipe, and "Order Appointing Appraisers," as called for in the 5th paragraph of said praecipe, which are not included herein for the reason that I do not find any such papers or orders among the records and files in this case, and have heretofore so advised counsel for appellant.

I further certify that the Clerk's fees for preparing the transcript of this record amount to Eighty and No/100 [152] (\$80.00), and that the same has been paid to me in full by counsel for the appellant, William Cowan.

I further certify that the original Citation issued in this cause is attached hereto and made a part hereof.

WITNESS MY HAND and the seal of said court this 15th day of December, 1922.

[Seal] C. R. McFALL,
Clerk United States District Court for the District of Arizona. [153]

In the United States Circuit Court of Appeals for
the Ninth Circuit.

WILLIAM COWAN,

Appellant,

vs.

JOHN P. CULL, Trustee in Bankruptcy in the
Matter of EARL N. McKINNEY, Bankrupt,
Appellee.

Citation (Original).

United States of America,
Ninth Circuit,—ss.

To John P. Cull, Trustee in Bankruptcy in the
Matter of Earl N. McKinney, Bankrupt,
Number B-31—(Tucson), United States District
Court for the District of Arizona, GREETING:

YOU ARE HEREBY CITED AND ADMON-
ISHED to be and appear in the United States
Circuit Court of Appeals for the Ninth Circuit, to
be holden at San Francisco, California, on the 15th
day of November, A. D. 1922, pursuant to an appeal
allowed in the Clerk's office of the District Court
of the United States for the District of Arizona,
in the Matter of Earl N. McKinney, Bankrupt,
wherein William Cowan is appellant and John P.
Cull, Trustee in Bankruptcy in the Matter of Earl
N. McKinney, appellee, to show cause, if any there
be, why the judgment in said appeal mentioned
should not be corrected and speedy justice should
not be done to the parties in their behalf.

WITNESS the Honorable JOSEPH McKENNA, Justice of the United States Court of Appeals for the Ninth Circuit, this 16th day of October, in the year of our Lord nineteen hundred and twenty-two.

[Seal]

WM. H. SAWTELLE,

District Judge of the United States District Court for the District of Arizona.

Service of the above citation accepted this 27th day of October, 1922, by me, C. V. Manatt, attorney of record of said J. P. Cull, Trustee, and I hereby enter my appearance for said J. P. Cull, trustee in the U. S. Circuit Court of Appeals.

C. V. MANATT,

Atty. for Trustee in Bankruptcy in the Matter of Earl N. McKinney, Bankrupt.

[Endorsed]: No.— In the United States Circuit Court of Appeals for the Ninth Circuit. William Cowan, Appellant, vs. John P. Cull, Trustee in Bankruptcy in the Matter of Earl N. McKinney, Bankrupt, Appellee. Citation. Filed Oct. 28, 1922. C. R. McFall, Clerk United States District Court for the District of Arizona. By Paul Dickason, Deputy Clerk.

[Endorsed]: No. 3933. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of Earl N. McKinney, Bankrupt. William Cowan, Appellant, vs. John P. Cull, as Trustee in Bankruptcy in the Matter of Earl N. McKinney, Bankrupt, Appellee. Transcript of Record. Upon

Appeal from the United States District Court for
the District of Arizona.

Filed December 18, 1922.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.